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ON THE LAW OF THE TRANSVAAL.

There can be but little doubt that much has yet to be done in order to bring the law of the South African Republic (Transvaal) up to the standard required by modern mercantile transactions and the present state of civilisation. There are some points which stand out more prominently than others as requiring immediate reform, and the object of the present note is to touch lightly upon a few of these. The Municipal law of the Transvaal is based upon certain 33 Articles (Drie-en-dertig Artikelen), the Grondwet and other laws and resolutions (besluiten) of the Volksraad. The Common Law (where not regulated by the Drie-en-dertig Artikelen, the Grondwet, local laws and Volksraad besluiten) is governed by the law of Holland; this was laid down by Art. 31 of the Drie-en-dertig Artikelen (in the year 1844), but seeing that doubt soon arose as to which laws of Holland it was intended to take as a basis, the Volksraad in 1859 enacted as follows:—

(*a*). That the Law Book of Van der Linden (in so far as the same is not contrary to the Grondwet and other laws, and Volksraad besluiten) should be the Law Book in the State.

(*b*). That whenever that Law Book was not clearly sufficient, or did not deal with any particular case, then the Law Book of Simon Van Leeuwen and the Introduction of Hugo de Groot should be binding.

In view of the fact that Van der Linden wrote his work in 1806, it can at once be seen that unless subsequent legislation has done much to modernise the law (which it has not) the Transvaal Common Law is nearly a century behind hand.

It was not until the last session of the Volksraad that a Besluit was passed, authorising the execution of under-hand wills. Previous

to that much uncertainty had existed as to the proper manner of execution, and persons unacquainted with the Roman-Dutch law on the subject had in many cases drawn and executed their own wills before two witnesses, ignorant of the fact that they were not worth the paper they were written upon. Free testamentary disposition has proved a boon to the Cape Colony, but in the Transvaal the old law is in force, and the legitimate portion must be provided for. This in itself raises a serious complication, and in this way: A large proportion of the property-holders of the Transvaal have also property in Europe, the Cape Colony, or Natal; then supposing they become legally domiciled in the Transvaal, how is the estate to be administered? Certainly not in accordance with the idea the majority of laymen have upon the subject.

The law regarding promissory notes, bills of exchange, and cheques, is also deserving of amendment, although in this respect, the Courts have recognised the change in mercantile transactions, and are guided to a great extent by modern decisions.

Upon the necessity for legislation with regard to Joint Stock Companies a volume might, with ease, be written. The Law No. 5, of 1874, entitled, "The Act of Companies with Limited Liability" is very much the same as the old Act of the Cape Colony founded upon the ancient English Act of 1855. In a country where so much money has been invested in Joint Stock Companies, and where all the principal industries are conducted by means of such Companies, one would think that explicit and elaborate laws, formed upon the basis of the most modern enactments of other countries, would be one of the first matters to engage the attention of the legislators. But it has not been so in the Transvaal. The whole law with regard to Joint Stock Companies requires remodelling. Greater protection to shareholders should be afforded than exists at the present time; the issue of a bogus or fraudulent prospectus should be prohibited under penalty; Companies should be allowed to issue bearer shares; registration of the Company should be made at the time of its formation instead of after; and the winding-up of Companies should be properly provided for.

Trade marks are at the present time in no way protected, and evil minded persons have not been slow to avail themselves of the fact.

The marriage law is one which calls for immediate amendment, and especially with reference to the marriage of coloured persons, for the law now in force only applies to white persons and especially excludes those of colour; so that it would appear to be impossible for Christian coloured persons to contract a valid marriage in the Transvaal.

There are numerous other points of less importance upon which the local laws, as well as those laid down by Van der Linden, Van Leeuwen, and Grotius, require amendment. The foregoing, however, stand most prominently forward as demanding attention with the least possible delay. There are other matters only requiring repeal or elucidation, and in this respect the brokers—who are by no means an unimportant body in the community—occupy an unenviable position, for, if Schorer be correct, they cannot become parties to a bill of exchange.

It is to be hoped that in the interests of the public, the Volksraad of the South African Republic will not allow another Session to pass by without making radical reform in at least some of the subjects which have been referred to above.

Note.—Since writing the above a draft law, to be submitted to the next session of the Volksraad, has been published in the *Staats Courant*. Its object is the amendment of the Limited Liability Act. It commences with an almost *verbatim* copy of the Directors' Liability Act, 1890, of England (53 and 54 Vict. Cap. 64), the text of which will be found at p. 253 of Volume VII of the *Cape Law Journal*. It further provides for the appointment of a new officer to be called the "Registrar of Companies and Patents," to whom, on the formation of a Limited Liability Company, a prospectus of such Company must be sent in; all Companies are further required to send in half-yearly returns of the full names of the Directors, Trustees and Secretary, who shall be taken as holding such office until the names of new Directors, Trustees or Secretary have been registered; the Directors are obliged to give notice at the Registration Office within three months in the event of the Company going into liquidation or amalgamating. Breach of these provisions is punishable with a heavy penalty. It also provides that a Company may be sued in any Court in its corporate

name, notwithstanding anything to the contrary in the Articles of Association, provided that service of summons is made on the representative of the Company, or at its registered office.

The public should be grateful for the amendment provided for in this draft law, and accept it as an earnest of what is to come, for there is yet a very great deal to be done before the Limited Liability Laws of the South African Republic are anything like perfection. It may be pointed out to those in charge of the Bill that the text, as printed in the *Staats Courant*, requires some little grammatical amendment; in two or three places the verbs have been accidentally omitted.

THE THEORY OF THE JUDICIAL PRACTICE.

CHAPTER XVI.

Divorce (continued).

2. The Commission of an Unnatural Crime.—This means either sodomy or bestiality. Though both by the English and the Dutch law sodomy applied to the carnal connection of a man with man, or a man with any other animal or beast, or with any woman *(per anum)*, yet bestiality is the term more properly used when a man commits this offence with any of the brute creation. By the Mosaic law the brute, or beast, with which this offence was committed must be destroyed; but by our law there is nothing to warrant this being done. The punishment for this offence by the Dutch law is death (Van der Linden, 2, 7, 7); and I know of several instances where such a sentence for this crime has been passed also in this Colony, though at the present time this sentence is not carried out, and the Courts now invariably inflict a discretionary imprisonment with hard labour, and with or without lashes. By the law of England the penalty is penal servitude for life as a maximum, and penal servitude for 10 years as a minimum punishment (Stephen's Crim. Law, Chap. 18, Art. 168).

It is no doubt on account of the repugnance of such a crime that the law of Holland allowed the innocent spouse to obtain a

dissolution of the marriage (Van der Linden, 1, 3, 9; Van der Keessel, Thes. 88; Schorer, 1, 5, 16; Merula, 4, 2, 10, 8). The English law on this subject is the same as with us (Pritchard's Hand-book of Marriage and Divorce, Chap. 9, p. 106, and Chap. 2, p. 140; Tichwell's and Little's Law of Divorce and Matrimonial Causes, p. 225; and Brown's Divorce and Matrimonial Causes, pp. 30 and 53).

I know of no case where a divorce has been applied for in this Colony on the ground of sodomy. The law is, however, clear, and is still in force with us. The summons and pleadings in such a case must set forth the facts in the same manner as in the other cases for divorce, and though the defendant be convicted, yet the sentence is in itself not sufficient evidence for the purpose of the divorce. The plaintiff will still have to prove the grounds of complaint independently of the conviction. It is the same by the English law.

2. PERPETUAL IMPRISONMENT.—Under this heading, as under the former, so far as I am aware, no case has been decided in this Colony, certainly not since 1859, in which a divorce has been applied for on the ground of perpetual imprisonment. That such, however, is the law, and is also in force with us, there is not the slightest doubt (Van der Linden, 1, 3, 9; Van der Keessel, Thes. 89; Gail, 1, 1, 44).

Schorer (1, 5, 16) and Merula (4, 2, 10, 8) say "that a wife whose husband has been condemned to the gallows may be regarded as a widow," the reason given being, "that she has a useless husband, and that such a man is regarded in law as civilly dead." This, of course, applies also to a husband whose wife has been condemned to imprisonment for life.

There are two cases reported in Holland on this subject. The first is that of Maria Van Driel, who was married to Adrian Maranisz Karmans. This case does not appear to have been judicially decided by the Court, but the plaintiff petitioned the States of Holland setting forth her marriage, and that her husband had in 1722 drowned his own child by a former marriage, and had fled to escape punishment; that he was thereafter, in his absence, tried and convicted, and sentenced, if found, to be broken alive on the wheel; and she therefore prayed the Court that whether he

was dead or alive, or found or not, the marriage between her and him might be dissolved, and she be at liberty to marry again whomsoever she pleased. This prayer was duly granted by the States of Holland on the 30th December, 1732 (G.P.B., Vol. 6, p. 540).

The second case, and by far the most important, and which would amply repay a careful study, is reported by Van der Linden in his Gewysdens (Vol. 1, p. 247, Case 32). It is that of Lysbeth Cornelis Zuidan against her husband, Kryn Kalkman, decided by the High Court of Holland in 1793. Kalkman was a night watch, and becoming unduly intimate with a woman called Dronke Pieternel, they committed arson, for which they were tried, found guilty, and condemned to be fastened to the gallows by their necks with a halter, to be severely whipped with rods, then branded with the double sword, and to be thereafter confined with hard labour for life. Lysbeth first applied to the States of Holland for a dissolution of the marriage, but was referred to the Ordinary Court of Justice. Here she applied for a *curator-ad-litem* to her husband, which was granted, and she brought her action. In her declaration she concluded with the following prayer: "That the bonds of marriage subsisting between her and her husband may by sentence of the Court be declared dissolved, by reason of the perpetual imprisonment. . . . . against the defendant, and that the plaintiff may be permitted, if so minded, to marry another." The case was defended by the husband, assisted by his curator, and on the 26th July, 1793, the Court gave judgment in his favour with costs. From this judgment an appeal was made to the High Court of Holland, which, on the 12th November, 1793, reversed the decision of the Court below with costs, and declared the said marriage dissolved by reason of the perpetual imprisonment, and Lysbeth was further declared at liberty to marry whomsoever she pleased.

4. Long Unknown Absence.—When either of the spouses has not heard of the other, or does not know of his or her whereabouts, for a period of five years, it is a good ground to entitle the innocent spouse to re-marry. The Placaat of Charles V, of the 18th March, 1656 (G.P.B., Vol. 2, p. 2446, § 90) says: "Thus he, who in the interest of the State, or to transact his own

private affairs, is obliged to go to a foreign country (or far away) and there remains a long time, whether through illness, or imprisonment, or for any other cause, so that no tidings can be obtained of or from him, it shall be permitted to the deserted (or innocent, *de verlatene*) spouse, without re-marrying, to wait the period of five years, according to the customary law, and after that time the Court may, upon due enquiry, permit him or her to re-marry."

The Court does not cancel the existing marriage, but only permits the innocent spouse, after the lapse of five years, to re-marry without being liable to the consequence of a prosecution for bigamy, or to be sued for adultery. But during these five years the innocent spouse (that is, *de verlatene*, the one who remains at home) must not have heard, or must not know, of the whereabouts of the absent spouse. Such a re-marriage is, however, to use a happy expression of the English law, *voidable*; that is, not necessarily void *ab initio*, but may become and be regarded as void only if the absent spouse turns up and insists upon having his or her spouse back; because, argue the Theological Jurisprudents, "the first marriage is restored by virtue of the return of the husband or wife, in the same way as restoration is taken of lands, houses, &c." In such a case, the second husband or wife must give him or her up. Such a second union being, however, *bona fide* entered into, no charge of adultery or bigamy can be made against the innocent spouse; and the children born of such union are legitimate, though the spouse re-marrying may be compelled to return to the first one. If, however, the first (or returned) spouse does not insist upon claiming the other back, the second marriage would remain good, and he or she may also re-marry by leave of the Court. In this application to the Court by the returned spouse, he or she prays for leave to re-marry, and in addition thereto (unlike the innocent spouse) prays that the first marriage may be set aside. If the returned spouse insists upon having the other back, the latter is bound to return, and his or her second marriage then becomes a nullity. If the spouse won't return, then the other can sue for divorce to cancel their own marriage. But in any case, the children born of the second marriage remain legitimate. If, however, the innocent spouse had re-married, not only on the

ground of the well-known absence of the other, but because he or she had good reason to believe, from the information or evidence received, that the absent spouse was dead, then the latter cannot compel the other spouse to return, nor sue for divorce, and the second marriage remains good (Van Zurck, Codex Batavus, Tit. "Huwelyk," § 29; Huber, Hed. Regts., 1, 6, §§ 7 and 8; Loenius, Dec. Case, 78; Van Alphen's Pap., Vol. 1, p. 60, and Vol 2, p. 589; Van der Keessel, Thes. 64 and 65; and Cos. over de Boedelmenging, p. 244, Chap 7, § 13).

It is no doubt owing to the strict interpretation in ancient days in Holland of the rule requiring proof of malicious desertion *ab initio* that the innocent spouse (the one remaining at home) petitioned for leave to re-marry, on not hearing of, or from, the other for five years, instead of suing for malicious desertion. In this Colony the former is now never resorted to, but recourse to the action for malicious desertion is always had (See my chapter on "Malicious Desertion").

By the law of England, however, the unknown absence of either spouse for a period of seven years entitles the innocent one (who remained at home) to re-marry without leave of the Court, and without the risk of being claimed back by the returned spouse, or of being sued by him or her for divorce (Stephen's Com. of the Laws of England, Vol. 4, Bk. 4, Chp. 12). There is a popular impression in this Colony among many people that this part of the English law is in force in this Colony, and, on the strength thereof, many marriages have taken place without any reference to the Court. All such marriages are, however, void *ab initio*. This branch of the English law is not in force here, but the said Placaat is still the law of the Colony. But, as stated in the Chapter on "Malicious Desertion," that owing to the modern interpretation by the Court as to the meaning of desertion, instead of applying to the Court for leave to re-marry, owing to the absence of either spouse, the more safe remedy of suing for malicious desertion is now always resorted to.

5. Refusal of the Marriage Privileges.—If either spouse obstinately and persistently, and without any reasonable cause, refuse the other the privileges of the marriage, it is also a cause of divorce (Cos., p. 148, § 17, and p. 225).

The action in such a case may be on the single ground to compel the defendant to cohabit with the plaintiff as husband and wife, within a time to be fixed by the Court. I am not aware of any Colonial decision on this point. In the case of *Tiffany* v. *Tiffany* (decided in 1886, not reported) the plaintiff's declaration set forth the refusal to cohabit, but it also alleged a subsequent desertion; and the decision of the Court was founded on the desertion only. But it is quite possible, and I have been consulted in cases where, for appearance sake, as they say, the parties continue to occupy the same bed or room together, but the woman from the outset refused her husband all marital privileges and boasted that she is his "virgin wife." In such a case there can be no action for malicious desertion, in the ordinary sense of the term, but it must be for an order in future (from a given date) to cohabit with the plaintiff as husband and wife. Failing which, the order for divorce would follow as in desertion cases. The delicacy and unnaturalness of the subject are probably the only reasons why we do not hear of such actions. The disappointed spouse invariably resorts to some unkind or disparaging remarks which induce, or compel, the other to leave, and which entitles him or her to sue for malicious desertion, and thus the real cause of desertion is not disclosed. Can a husband force his wife to have carnal connection with him? Yes, if his and her health permit it. Can she force him? Yes for the same reason. But what matrimonial bliss can there be when either party has always to force the other to the matrimonial privileges? But as neither party is bound to *compel* the other to matrimonial duties, it is sufficient to prove the refusal of the other in order to obtain relief.

6. Causes for which a Marriage may be Repudiated and Declared Void "ab initio."—As stated before, there is a very material distinction whether a marriage is to be repudiated on the ground of a pre-nuptial offence or bar, in which case the action is to have it declared that there never was a marriage, and thus the alleged marriage was void *ab initio*; or in an action for divorce to cancel a valid marriage on the ground of post-nuptial offence by either party. Under this heading I will treat only of marriages which can be *repudiated*, and which are void *ab initio*. They are divided into:—

(a). Impotency.—This means the incapacity, from whatever cause, on the part of either the man or the woman, to procreate. If a man is a eunuch, to use a Biblical expression, or is castrated, to use the legal expression, he is not even allowed to marry, and if he should marry his marriage is void *ab initio.* But a man may be incapacitated from procreating from other causes than castration. The Court may be satisfied, from medical testimony or otherwise, that the party accused was incapable of procreation at the time of the marriage. Of course, where the defect to procreate is not visible, and there is reasonable hope or belief that in time, or by delay, or by means of medical or surgical treatment, a cure is likely to be effected, then a reasonable opportunity should be allowed for it. When the defect to procreate is not visible, and is not otherwise known, or immediately ascertainable, or there is no immediate hope of success by means of medical or surgical treatment, then three years must intervene from the date of marriage before such a marriage can be set aside on the ground of impotency. This applies to the woman as well as to the man. But when the incapacity to procreate is visible, or ascertainable at once, then the marriage may be set aside at any time, or immediately after its celebration. Of course, if either party becomes incapacitated at any time subsequent to, though immediately after, the marriage, it is neither a cause for setting aside the marriage, nor for a divorce. In the case of doubt as to the capacity to procreate, the parties must submit themselves to medical inspection, or by clearly recognised matrons or midwives. In a suit for impotency, there must be proof that the party is absolutely incapable of consummating the marriage, and that where the defect is not visible, then three years' interval is necessary before this decree can be applied for, and then only if the medical evidence shew frigidity, or other incapability to have children; and there must be proof that no carnal connection took place during that period. In the case of the invisible defect of the husband, the wife alleges in her pleadings that he is "*propter frigiditatem, naturalem, et perpetuam impotentiam;* that they were married three years, during which time the husband never had had carnal connection with her, and that she is *virgo intacto sed capax viri,* and that he is *non potiut penem erigere nec fœminan penetrare et cognoscere.*" In a case of a

visible defect the three years' delay is not necessary. The English law upon this subject is copied from the Roman Law, and therefore the English decisions here quoted are of great assistance (St. Matthew, 17, vs. 11 and 12; 1 Cor., Chap. 7, v. 3; *Welde* v. *Welde* and *Alson* v. *Alson* reported in Dr. Lee's Ecclesiastical Cases, Vol. 2, pp. 518, 580 and 576; Huber Hed. Regts., 1, 5, 36, and 1, 6, 6; Grotius, 1, 5, 4; The Bellum Juridicum, Case 95; Decisions of the Court of Holland, Case 106; Van Zurk, Codex Bat., Tit. "Huwelyk," § 34).

(*b*). *Ignorance of Previous Stuprum.*—"Stuprum" is any connection of a man and woman otherwise than in marriage, or concubinage, and provided the woman was not married.

If a woman passes herself off as a virgin, not necessarily by proclaiming it, but by her conduct generally, and by retaining and being called by her maiden name, thereby leading people to believe that she is still pure; and a man, having no reason to think than she is otherwise than a virgin, marries her, and then discovers that she has been carnally known by another man before her marriage, he can repudiate the marriage and bring an action for divorce to have it set aside and declared void *ab initio*. The bare fact that the woman was not a virgin at the date of the marriage is no ground for setting aside the marriage, for there may be several good reasons, such as illness, disease, accident, or a medical operation, which might have caused a perforation of the hymen, and the woman be still innocent, pure, and chaste. Dr. Ramsbotham, in his Medical and Obstretic Surgery (p. 35), says: "Although the presence of the hymen was formerly considered as a test of virginity, from the supposition that it was invariably broken on the consummation of matrimonial intercourse; this idea has long been repudiated, for it now well known, not only that it may be destroyed and lost from various causes originating in disease or accident, but also that in some instances it does not give way upon the first, nor many subsequent, connections; and even that pregnancy has taken place while this membrane was entire. So that its presence can be no positive proof of personal chastity, nor its absence of immorality." It is thus a very serious matter to lay such a charge to a woman. Her honour, purity and chastity are too delicate flowers to trifle

with. They should, therefore, at all times, be most sacredly regarded. Before a man makes the insinuations, he should think several times, and take steps only when he has positive proof of her previous fall. For a good reason, therefore, the law has required that a man in such a case, in order to repudiate his marriage, must be able to prove that his wife has had carnal connection with a man before her marriage. It is not necessary that she should be pregnant by the other man; and if she should be pregnant by her husband, he is not bound to support the child, differing in this respect from the usual law of support of bastardy (See my chapter on "Affiliation.") The action should be, not as in divorce for a post-nuptial offence, but to have the marriage declared void *ab initio*, on account of the fraud practised on him by reason of her *stuprum* with another man before marriage (*Nel v. Nel*, 1 Menz., 274). The husband must swear that he had not had carnal connection with the woman before marriage; that he believed her to be a virgin, and also that he was ignorant of her previous condition. Of course, if he himself had had connection with her before marriage, he cannot after marriage repudiate her, because he then discovered that she had had connection with another man also before marriage. The only case decided in this Colony on the subject is that of *Horak* v. *Horak* in 1861 (3 Searle, 389). In this case the proof was ample, as about four months after marriage the woman gave birth to a child, of which it was proved that it was impossible that he could be the father. In addition to the authorities quoted in Horak's case, see also Lybrecht's Red. Vert., Vol. 1, Chap. 12, § 16; Berg's Ned. Adv. Bk. Vol. 1, Cons. 100 (Note: This consultation is worthy of a careful perusal); Cos., p. 226-235; Van Zurk, Tit. "Huwelyk," § 34 and notes.

By the Mosaic Law such a woman was stoned to death (Deut. 22, vs. 13-22). By the Roman law the punishment was confiscation and partial forfeiture of goods (Just. 4, 18, 4). By our law there seems to be no punishment attached to it.

(c). Insanity.—If, either at the time of the marriage, or from the general previous state of health of either party, it can be proved that either the man or the woman was not in a fit state of mind to marry at the date of the marriage, the marriage is illegal.

It is not necessary to prove that the insanity was apparent to anyone of ordinary habits of observation; but the Court must be satisfied, from all the surrounding circumstances, that the party was in that weak, imbecile, defective state of mind as to be incapable of appreciating the nature and consequences of the marriage.

Of course, if either party becomes insane after the marriage, that is no ground for repudiating the marriage; and if either party is guilty of a post-nuptial offence entitling the other to a divorce, but becomes insane before the action can be heard, then the Court must appoint a Curator to such party before the trial. The case of *Mordaunt* v. *Mordaunt*, decided in the House of Lords in England in 1874, the arguments and judgment in which I had the privilege of hearing, was on this point decided, although it was not so stated, exactly in terms of the principles of our law. Defendant's father, Lord Moncrieff, was appointed her Curator, and one of the grounds of the defence stated was that, she being insane, could not answer the action for divorce, but the Lords held otherwise.

7. The Punishments for Adultery.—Though we do not hear of any criminal prosecution for adultery, there is still such a law in force in this Colony. By the Mosaic law the penalty for adultery was death (Deut. 22, vs. 22-24). By the Roman law it was at first also death, subsequently only a temporary relegation and a partial confiscation of property. After that, again, the infidelity of the husband was not regarded as a crime, but only the infidelity of the wife, on account of the danger of introducing strange children to the husband; but Justin finally enacted that the woman should be whipped and sent to a monastery for two years, after which she was to be returned to her husband, unless he had in the meantime divorced her, then she was to be sent back to the monastery (C., 9, 9, 1; D., 48, 5, 6, 1; J., 4, 18, 4; Novel, 134, 10.

By the law of Holland, which on this subject is still in force with us, the punishment in the case of two married persons committing adultery is banishment for 50 years, and a fine of 1,000 guilders. In the case of a married man with an unmarried woman, he is declared infamous and fined 400 guilders; she is placed on spare diet for 14 days. On a second conviction he is sentenced to a double fine and to banishment for 50 years; she is banished for

50 years. In case of an unmarried man with a married woman he is placed on spare diet for 14 days and fined 400 guilders; she is banished for 50 years. If repeated, both are banished for ever (Placaaten of the 1st April, 1580, Arts. 15-18, and 11th September, 1677, G.P.B., Vols. 1, p. 330, and 3, p. 507; see also Kersteman, Tit. "Dissolutie.") But as we have now no place whither to banish our prisoners to, the penalties as regards banishment are practically inoperative for the time being, but the other penalties can still be inflicted. In England adultery is no longer a criminal offence, but only an ecclesiastical one; the punishment for which is to do penance and to be excommunicated, and to be imprisoned for a term not exceeding six months, but which punishment is in these days never enforced (Stephen's Dig. Crim. Law, Art. 170).

8. FORFEITURES.—As a general rule the guilty party forfeits in favour of the innocent all benefits derived by virtue of the marriage, whether by way of dowry or marriage settlement, or community of property, and also whatever was given by the one to the other *stante matrimonii* (Hol. Cons., Vol. 1, Cons. 334; and Berg Ned. Adv. Bk., Vol. 1, Cons. 118). But this means only the benefit derived from the other party, not from any other source, nor any benefits kept out of the marriage, nor any benefits specially directed by the ante-nuptial contract should, after the dissolution of the marriage, go to any other source other than the innocent spouse (Hol. Cons., Vol. 2, Cons. 51 and 138, and Vol. 4, Cons. 246 and 247; Bynkershoek, 2, 9).

The summons and the declaration should therefore specially ask for the forfeiture of the benefits, and where this has been omitted, and the Court has granted an equal division of the joint estate of the plaintiff and the defendant, the plaintiff cannot afterwards get the judgment varied so as to declare the defendant to have forfeited all benefits from the community (*Noetje* v. *Noetje* 6 Juta, 9). When the parties were married in community of property, the guilty party forfeits only his or her share in the community, but not anything he or she had before the marriage. Thus in the case of *Beyers* v. *Beyers*, decided in 1884 (not reported), the guilty spouse had about £150 when she married; she was allowed to get back this money, but forfeited her share of

the joint estate, minus this £150. So also in the case of *Dieperink* v. *Dieperink* (Buch. Rep. for 1877, p. 92), the Court declared the defendant not entitled to her share of the community except so far as she may have contributed any property towards the community. But where a settlement has been made of a Life Policy by the husband on the wife by ante-nuptial contract, the wife, on being found guilty of adultery, was declared by the Court to have forfeited her benefit in the Policy (*Higgins* v. *Higgins*, 5 E.D.C., 344). So also was a similar order given in the Supreme Court in the case of *Wylde* v. *Wylde*, decided in December, 1889 (not reported).

On a dissolution of a marriage, if there is property to be divided, and the parties cannot agree upon the division, the Court will either itself divide the property, or appoint some one to do it.

The custody of the minor children of the marriage is, on a decree of divorce being granted, generally given to the innocent spouse (*Farmer* v. *Farmer*, 1 Menz., 278, and several subsequent cases not reported, for instance *Lio* v. *Lio*, decided in 1876). But there may be special circumstances to justify the Court in leaving the children with some other competent person. Thus in the case of *Theron* v. *Theron* (decided in 1876, not reported), the children were left with the paternal grand-mother with whom they had always lived and whom the father paid. In the case of *Wylde* v. *Wylde*, quoted above, the child was left in the custody of the mother, the guilty spouse, with whom she had lived so many years during the father's necessary absence on business, but with right to the father at any time, if occasion should arise, to apply to the Court for the custody of the child. Though the husband should be the guilty spouse and the children ordered to be in the custody of the mother, he can be compelled to support, educate, and maintain the children till they are of a suitable age, according to circumstances, to maintain themselves (See my Chapter on "Judicial Separation"). But whoever has the custody of the children, the guilty party is allowed at all reasonable times to see them, either where they are staying, or at some other suitable place, or even that they should visit him at his home (*Wylde* v. *Wylde*, quoted above).

The costs of the action are also in the discretion of the Court; generally the usual rule is followed that the guilty party should

pay the costs (*Hablutzel* v. *Hablutzel*, 1 Menz., 276, and *Lio* v. *Lio*, above quoted, and several subsequent cases; and see also my Chapter on "Costs.")

When the wife wants either to institute an action against her husband, or to defend one brought against her by him, whether for divorce or judicial separation, she is entitled to claim from him alimony *pendente lite*, and also the probable costs likely to be incurred by him. Both these are entirely in the discretion of the Court, which has sometimes granted, and at other times refused, the applications If there is clear *primâ facie* evidence of the woman's guilt, the application for maintenance and costs is invariably refused; where there is no such allegation, particularly where she is plaintiff, or whether plaintiff or defendant, the charge against her is denied, and can only be settled by the Court, then the alimony allowed is in proportion to her necessary requirements, according to her station in life and her husband's means, and the costs allowed are proportionate to the probable expense of instituting or defending the action.

If the woman has an independent estate of her own sufficient to maintain herself and meet her costs of the action, then, though it is still in the discretion of the Court to compel the husband to contribute alimony and costs, her application is more likely to be refused, or a very small amount will be granted. Generally, when the parties were married in community of property, the application if very rarely refused, except in a clear case of the woman's guilt. The application to the Court for alimony or costs should fully set forth the facts in an affidavit so as to justify the Court in granting the order and a reasonable sum. On the other hand, in opposing it, evidence of the woman's independent means to maintain herself and meet her own costs, or such *primâ facie* proof of her guilt, should also be set forth in an affidavit to induce the Court to refuse her application (Consult Merula, 4, 37, 2, 16; Wassenaar's Jud. Prac., Vol. 1, Chp. 1, § 48; Boey's Woorden Folk, Tit. "Alimentatie;" Pritchard's Handbook of Marriage, pp. 10-20; Kersteman's Woordenboek, Tit. "Alimentatie;" and Hol. Cons., Vol. 5, Cons. 145). In the case of *Bloem* v. *Bloem* (Buch. Rep. for 1869, p. 68) the Court ordered £10 to be paid towards defendant's costs, but refused the application for alimony. In the case of *Flannagan*

v. *Flannagan* (1 E.D.C., 42) the Court granted £60 for costs. In the case of *Eaton* v. *Eaton* (5 E.D.C., 236) the Court granted £30 towards costs. In *Stage* v. *Stage* (2 Juta, 229) the Court granted £25 towards costs. In the three last cases nothing was said about alimony, but it was understood that the applicant might retain for her maintenance a portion of the amount granted towards costs. In the case of *Van Blommestein* v. *Van Blommestein* (1 Ford, 81) the Court ordered £150 to be paid towards costs.

Subjoined to my Chapter on "Costs," (pp. 68-73) I have given the practical forms which may be followed in applications of this kind.

With us, immediately the divorce is granted, both parties are at liberty to marry at once again, but in England a decree, or *rule nisi*, is first granted by which neither party may marry, formerly for 12, but now for 6, months from the date of the decree. This is to enable the Queen's Proctor to intervene, if he chooses, and to prevent the divorce being granted upon good grounds, such as, for instance, connivance on the part of both parties, or that on the ground of the guilt of both, neither is entitled to a divorce, or for any such other reason as might successfully have been advanced in the defence of the action. It very rarely happens that the Queen's Proctor intervenes. But with us there is no such provision; the divorce being once granted, there is no means of upsetting it, unless indeed in the unlikely event of fraud being clearly proved in obtaining it. But all the reasons that might be used in England by the Queen's Proctor, pending the *rule nisi*, might be successfully used here also in opposing the action for divorce.

C. H. Van Zyl.

THE IRRIGATION ACTS.

Much is being spoken and written in these days by would-be members of Parliament and others about the necessity for setting on foot irrigation schemes on a large and comprehensive scale; and much advice on the subject has been, and is being, tendered to,

and often much abuse, too, heaped upon, Governments of the day for their alleged luke-warmness in the cause of irrigation. But little, in all probability, is known, even by those whose tongues and pens are most employed with the matter, of what has already been done by past Parliaments of this colony to encourage and promote irrigation.

The object of this article is to place before the readers of the *Cape Law Journal*, in a form devoid as far as possible of the technical phraseology of Acts of Parliament, the existing legislation on the subject of irrigation. A full statement or abstract of the various Acts of Parliament, section by section, would be tedious for both writer and reader, and would moreover serve no good purpose; but a statement of the salient features of the Acts will perhaps prove of interest and service to many, and induce some to study the statutory legislation on the subject with a view to fuller and more accurate knowledge.

The first Act which need be noticed is 24 of 1876, "To enable persons having a right to water to convey such water across the lands of other persons." An Act which clearly had for its object, although perhaps only indirectly, the promotion of irrigation.

This Act was repealed by Act 26 of 1882, which re-enacted many of the provisions of the Act of 1876, together with many additional ones. In 1877 an Act was passed (8 of 1877) for the promotion of irrigation, which embraces nearly all the existing legislation on the subject. This Act was altered and amended, but to no great extent, by Act 7 of 1880. In order to assist Municipalities in carrying out irrigation works, Act 28 of 1879 was passed. These Acts contain all the legislation of the Cape Colony directly affecting irrigation. Of these, Act 8 of 1877 as amended by Act 7 of 1880, claims our first attention as being by far the most important and comprehensive. Indeed, space will not permit us to do more in this Article than summarise the provisions of this Act.

The Act deals with: 1. Constitution of Irrigation districts; 2. Constitution and proceedings of irrigation Boards; 3. General powers and duties of Boards; 4. Rating powers of Boards; 5. Borrowing powers of Boards; 6. Irrigation by private owners; 7. Settlement of disputes by arbitration; 8. Miscellaneous matters.

We will now set out as clearly as we can what appear to be the more important provisions of the Act, observing the above order.

Irrigation Districts.

These may be constituted by the Governor on the petition of not less than three owners of land situated within the area which it is proposed to form into an irrigation district; and these owners must, moreover, own an average of not less than one-tenth of the land which falls within such district. The petition should contain a statement of the boundaries and approximate extent of the proposed district, and generally a recital of what is required to be done in the district in the way of works or otherwise. The petitioners are also required to publish the fact of their having presented the petition, and a copy or a summary of it, in the *Government Gazette* and in a local newspaper. Not later than six months after the presentation of the petition the Governor may, if so pleased or advised, send an engineer or other competent person to the proposed irrigation district for the purpose of ascertaining by personal observation and inquiry on the spot, the desirability or otherwise of forming an irrigation district there. Before going to the district the engineer is obliged to give notice, in such a way as the Governor may direct, of his intention to visit the district for the purpose of inquiry, and to fix a time and place at which he will be prepared to hear all persons desirous of expressing their views on the subject. On the conclusion of the inquiry the engineer has to report as soon as may be the result thereof. Then, if the Governor is of opinion that it is desirable to constitute an irrigation district in such place, and that the owners of at least two-thirds of the land situated in the district are in favour of the scheme, he may issue a proclamation declaring such district to be duly constituted an irrigation district. Power, however, is reserved to the Governor, after making due inquiry, and obtaining the consent in writing of at least two-thirds of the owners of the land, to either revoke his proclamation, or to alter the boundaries of the irrigation district.

Constitution and Proceedings of Irrigation Boards.

After the constitution of a district for the purposes of irrigation, all the management and superintendence of the works in connection therewith is vested in a Board consisting of not less

than three, and not more than seven, members, which is called an Irrigation Board.

The Act then goes on to specify in detail the mode of nominating and electing members and the like, but scarcely any of the provisions of this part of the Act need be set out here. It will be sufficient to note that the qualification both for voting and membership, is ownership of property situated in the proposed irrigation district, valued for Divisisional Council purposes at not less than £500. With regard to the proceedings of Irrigation Boards, the regulations governing them are very much the same as those which govern the proceedings of all public bodies, and need not be specially mentioned here.

General Powers and Duties of Boards.

Section 33 of the Act, which fully and clearly sets forth the duties of Irrigation Boards, reads as follows:—"The charge and conservation of every natural river, stream, creek and watercourse, and of every dam, vley and embankment, within the limits of an irrigation district, which is by its nature common to two or more of the owners of land within such district, and the absolute control and regulation (so far as the same can be effected by artificial means) of the supply of water throughout the course of every such river, creek or water-course, within such limits as aforesaid, shall be vested in the Irrigation Board of such district. The Board has power, *inter alia*, (*a*) to cleanse, repair, and keep in a state of efficiency, any natural stream, existing dam, vley, and the like, which by its nature is common to two or more owners of land in the district; in other words to maintain existing works. (*b*) To improve existing works by deepening, widening, straightening, and the like, any river, dam, reservoir, vley, &c., which is in its nature common to two or more owners in the district. (*c*) To make any new embankment, dam, watercourse, and the like, or to erect machinery, or generally to do anything required for the storage and drainage of water, or for the irrigation of the area; in effect, power to construct new works.

The Board, however, cannot by virtue of the above powers, compel a person to do any work at his own expense, which he would not have been compelled to do by law before the passing of

the Act, and full compensation has to be made to owners for injury sustained through the exercise of the above powers by the Board. The Board has also power to enter and take possession of lands which are *bona fide* required for the purposes of the Act, and may carry away any materials from the lands which are required for the prosecution of the works. Compensation, according to agreement, or failing that, such as is fixed by arbitration, has to be paid to the owners, occupiers, or lessees of the lands in the above cases. The Board has also power to purchase lands for its purposes.

The rights of persons who have erected weirs, mill-dams, and the like, for the raising of the level of water, or other purposes of profit, are strictly guarded by the Act. Unless the owner of such work consents to the Board's interference with it, nothing can be done until the three following questions have been submitted to and answered by the nearest Magistrate, or failing the consent of the parties to his adjudication, by arbitrators:

(1) Whether the proposed removal or interference is necessary for the effectual carrying out of the Act.

(2) Whether the proposed removal or interference will cause any injury to the owner or occupier.

(3) Whether any injury that may be caused by removal or interference is, or is not, of a nature to admit of being fully compensated for by money.

If the answer is that the interference is not necessary then the Board is powerless to take action. If, that it is necessary, but that the injury caused thereby is not of such a nature as to be compensated by a money payment, the Board is still powerless. But if the answer is that the proposed interference is both necessary and can be compensated by money, then the Board has power to act on making such compensation as may be decided upon by agreement, or failing that, by the Magistrate, or by arbitrators. Before entering upon or purchasing lands, or taking materials from them, and before removing any mill-dam, weir, or the like, for the purposes of the Act, the Board is required to give notice of their intention by publication in the *Government Gazette* and in a local newspaper; and, further, to serve a copy of the notice on the owner or occupier of the land, and the mortgagee, if any. The Act then goes on to indicate the procedure in cases where the

amount to be paid as compensation cannot be agreed upon by the parties.

Rating Powers of Board.

The Board may levy rates upon all property in the district which is irrigated, or capable of being irrigated, by the Board, regard being had to the value the owners of land are likely to derive from the irrigation works. Money raised in this way is, of course, to be devoted to defraying the expenses necessitated by the carrying out of the Act. In suing for the recovery of rates, the Board may proceed against either the owner or occupier, or both. The Board is further empowered to make reasonable charges for the use of water belonging to or stored by them. Land, which previous to the operation of this Act, had been irrigated, or improved by the means contemplated by the Act, is not liable to be rated, unless its value has been enhanced by the works set on foot by the Board. The rights of owners or occupiers to any water which they were entitled to receive, previous to the enforcement of the Act, from any natural stream, reservoir, &c., is reserved to them free of any rate or charge. But if their supply is increased or improved by the action of the Board, then they are liable to be rated in respect of such improvement and increase. In case of differences between any person and the Board, where the amount of dispute does not exceed £20, an appeal lies to the Magistrate of the Division, and where it is in excess of that amount, to one of the Superior Courts.

Borrowing Powers of Board.

The Board may borrow money for the purposes of the Act on the security of the rates, or any other security which they may be in a position to offer. Money borrowed in this way is to be secured by Debentures issued by the Board. For the purpose of repayment the Board is required to form a sinking fund, into which a sum of not less than one-fortieth of the sum borrowed is to be placed each year. The Board may either borrow from the public by calling for tenders for the loan, or may petition the Governor to allow them the sum required out of the funds provided by Parliament. In the latter case the Governor causes due inquiry to be made as to the necessity for the loan, the nature of

the security, &c., and then accedes to or refuses the request as he thinks fit. In case the Governor grants the request he may appoint an officer to inspect and report on the lands and works in respect of which the advance is made.

Irrigation by Private Owners.

An owner of land outside the limits of an irrigation district, who wishes to improve his farm by works for the purpose of irrigation, or storage of water, may petition the Governor for a loan to defray the expenses of such works. The petition should contain full particulars in order to enable a proper conclusion to be arrived at. If the Governor, after due enquiry and receiving the report of an engineer, views the application favourably, he grants a provisional certificate to the petitioner, declaring that upon its being shown to the satisfaction of the Commissioner of Crown Lands that the proposed works have been executed according to the plans and specifications in a proper manner, such Commissioner will authorise the Treasurer-General to pay over to the petitioner an amount not to exceed the amount actually expended on the works. By Section 2 of Act 7 of 1880, the Commissioner of Crown Lands is empowered to advance by way of instalment an amount not exceeding one-fifth of the whole sum to be advanced. The money advanced in this way is secured by a rent charge on the land which is preferent to other claims, and has to be paid for 24 years. But the amending Act of 1880 enacts that the rent charge may be increased to such an amount as will repay the sum advanced sooner than 24 years, if the owner so desires, and obtains the consent of the Commissioner of Crown Lands. And further, a rent charge may be redeemed at any time before the expiration of 23 years from its imposition, by payment of a sum to be ascertained according to the Schedule annexed to the Act. The person who has to pay the rent charge is bound to maintain the works so long as the charge continues. But before a charge of this kind is imposed, public notice has to be given of the proposed advance, in order that any mortgagee of the land, or person having an estate in, or charge on it, may have an opportunity of objecting. The Act next details the steps to be taken in getting disputes settled by arbitration, matters of no general interest.

MISCELLANEOUS.

Under this heading it will suffice to notice that the Board has the power of making bye-laws for the more effectual carrying out of the provisions of the Act; and that every Irrigation Board is competent to exercise the powers of the Passage of Water Act, of 1876 (repealed by the Passage of Water Act, of 1882). What these powers consist in, the length to which this summary has attained, prevents us now from setting forth. How far these legislative enactments, professedly directed to promote the advancement of so serious a necessity as that of irrigation, are found in practice to be adapted to the requirements of landawners in the Cape Colony, we do not attempt to discuss. The question will doubtless commend itself to the consideration of those who are primarily, even vitally, concerned in the fertilisation of land.

REVOCATION OF AN OFFER.

Sir William Anson,* in commenting upon several cases of contract, points out serious difficulties in the way of reconciling them which turn upon the relative rights of parties with respect to withdrawal or revocation of an offer before acceptance. We cannot hope successfully to point out the solution of the difficulties raised by Sir William Anson's analysis after it has been abandoned by that learned author, but an examination of the cases in question, and an analysis of some of the objections and difficulties commented upon by the learned author, may be of some use. We shall first state the cases which appear to conflict, and then consider the objections raised, which will, of course, involve a consideration of the particular phases of the law of offer and acceptance applicable to them respectively, and also in their relation to the general law.

In *Byrne* v. *Van Tienhoven*[1] it appeared that the defendants, carrying on business at Cardiff, wrote to the plaintiffs, carrying on

*Author of Principles of the English Law of Contract and of Agency in its relation to Contract. Oxford: At the Clarendon Press. [Ed. *C.L.J.*]

[1] L. R. 5 C P. D. 344.

business at New York, on the 1st October, offering 1,000 boxes of tinplates. The letter reached the plaintiffs on the 11th October, and they immediately cabled an acceptance. On the 8th October, the defendants wrote a letter to the plaintiffs, by which they attempted to withdraw the offer of the 1st October, and posted it, and the plaintiffs received it on the 20th October. On the 15th October, the plaintiffs wrote confirming their cable despatch. The defendants declining to carry out the sale, the plaintiffs brought the action. It was tried before LINDLEY, J., without a jury, and the questions which the learned judge presented as calling for adjudication were two: 1. Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent? 2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent? Both questions were answered in the negative, and judgment went for the plaintiffs.

In *Dickinson* v. *Dodds*[2] the facts were that the defendant Dodds signed a paper by which he agreed to sell a piece of land to the plaintiff, and added in a postscript that the offer was to be left over till Friday at nine o'clock a.m. Before that hour he sold the land to Allan; and the plaintiff having heard of it delivered a written acceptance of the offer to the defendant Dodds before nine o'clock on the Friday named. He then brought an action against Dodds and Allan for specific performance by Dodds, and a declaration that Allan had no interest in the land. The action was dismissed by the Court of Appeal, reversing the judgment of BACON, V.C., who had decreed specific performance. JAMES, L.J., states categorically that "there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retractation. . . Of course, it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed." MELLISH, L.J., considers the sale to some one else as equivalent to the death of the offerer, because it makes the performance of the offer impossible. He also puts it that the contract of the sale to Allan, having been completed first, was entitled to prevail as being first in point of time. He also states

[2] 2 Ch. D. 463.

that if the law is that an offer is a mere *nudum pactum* until accepted, the acceptor cannot make a binding contract if he knows that the offer has been made impossible of acceptance by a sale to some one else.

In *Cook* v. *Oxley*[3] the defendant offered to sell a quantity of tobacco to the plaintiff, and to keep the offer open until four o'clock. The tobacco was sold to some one else meanwhile. Judgment was arrested after verdict for the plaintiff, the Court holding that the declaration did not disclose a cause of action by alleging a contract. Sir William Anson says of this decision: "It certainly would seem that the Court not only regarded Oxley as free to revoke his offer at any time before acceptance, but free to revoke it by a mere sale of the goods without notice. The judgments are even open to the construction that they regard Oxley's offer as no more than an invitation to do business on certain terms within a certain time; and not to be an offer which, unless revoked, might be turned by acceptance into a binding contract."

In each one of these cases the same question arises and is disposed of, except that in *Cook* v. *Oxley* the authority, as far as it is binding, must be confined to the question of the sufficiency of the plaintiff's declaration, for on that the case turned. In each the same state of facts was presented—an offer was made and retracted —except that in *Byrne* v. *Van Tienhoven* the offer became a contract by acceptance before the letter of withdrawal was received. They are, therefore, fair cases for comparison or contrast, as showing how the matter of offer and withdrawal has been treated in slightly different phases.

It must be observed that in *Byrne* v. *Van Tienhoven* the sole question was as to the effect of a letter of withdrawal; while in *Dickinson* v. *Dodds* the right of a third party, who had made a complete contract, intervened. The importance of settling a case of the former class upon an absolutely true principle is apparent when we come to consider the right of the offerer to create such a new right as was dealt with in the latter case.

Sir William Anson's difficulties will best be stated in his own words. He approves of *Byrne* v. *Van Tienhoven*, but considers the other two cases to conflict with the rule upon which it is based.

[3] 3 T. R. 653.

Cook v. *Oxley* is in most of the text books treated as of less importance than is here attached to it, the decision having turned upon the pleadings, though in fact the test of the sufficiency of the declaration was, of course, whether it stated a sound legal proposition.

With regard to *Dickinson* v. *Dodds* the learned author suggests three grounds upon which it may be distinguished from *Byrne* v. *Van Tienhoven*: First, the knowledge of the acceptor may be treated as good notice of revocation. This is said to be dangerous ground. Secondly, the distinction may be that in both *Cook* v. *Oxley* and *Dickinson* v. *Dodds* the sale was of a specific thing, the disposal of which before acceptance would be a sufficiently overt act to amount to a revocation. Thirdly, there may be a warrant for the view that where the parties are in direct communication the theory of the "continuing offer" does not hold. He then summarises the difficulties as follows: "There is an offer outstanding for the sale of a specific thing, which offer may be turned into a promise by an acceptance within a limit of time fixed by the parties. If the parties had been contracting by correspondence, then, as against an acceptance made within that time, a revocation would be of no avail unless it were previously communicated to the acceptor. An unauthorised communication is made to the intending acceptor that the offerer has, not merely formed the intention of revoking his offer, but has actually sold the thing offered. The acceptor, in the full belief, as he admitted, that the property had actually passed to a third party, endeavours, by an acceptance made within the prescribed time, to bind the offerer. The offerer had done nothing to communicate his intention to revoke, or his revocation, up to the moment of acceptance, yet he was held not to be bound. It must be left to the Courts to distinguish this case, whenever it may be necessary to do so, from *Byrne* v. *Van Tienhoven*. They will have to say whether the ground of distinction lies in the fact of communication being made somehow of the offerer's changed intention; or in the fact that what the offerer did was, not merely to change his mind, but by the sale of the specific thing offered to put it out of his power to fulfil his offer; or in the fact that the parties were not contracting by correspondence; or, lastly, in the fact that the acceptor admitted

that he made his acceptance in the full knowledge that the offerer not only *would not*, but no longer *could*, perform his offer."

With regard to the first distinction, if we may venture to say so, we think that this suggested distinction embodies the true explanation of the case, and contains the sound rule upon which all cases of retraction, so-called, are based. The learned author, in criticising it, says: "Would the same rule apply in the case of an offer of personal services and notice from a stranger that the offerer had made an inconsistent engagement?" And he points to the inconvenience to the acceptor arising from his not knowing what to believe from other sources. To state the case of a personal engagement is merely to state the proposition in another form, and does not advance us. And it may be said that if a proposed acceptor will take time to think, he must submit to the risks and inconveniences that arise from his own deliberate action.

It is worth while to examine this suggested distinction, and ascertain its validity.

It has not been disputed, it is too late to dispute, that an offer by letter is presumed to be a continuing offer until accepted or withdrawn. "The law," says Sir William Anson, "regards the offerer as making the offer during every instant of time that his letter is travelling, and during the period which may be considered as a reasonable time for acceptance." This is equivalent to saying that the offer is made at the last moment of time before acceptance or withdrawal, as well as at every previous moment. Consequently, an offer communicated may be withdrawn the moment before acceptance. In other words, the offerer has complete control over his offer before acceptance. From this point of view, as well as from that of the acceptor, it is considered as made immediately before withdrawal or acceptance. He may offer to as many as he pleases at the same time, and may retract all or any of his offers. He puts himself under no obligation by offering, and therefore he is liable to no one by reason of offering or retracting. If an offer were made and forwarded, but never reached its destination, no obligation could, of course, arise; but if the person for whom it was destined got knowledge of it elsewhere, could he not presume it to be continued to, or in fact to be made at, the moment at which he acquired knowledge of it, and could he not

then accept and enforce it? If the essence of contract is the *consensus* of two minds, the moment they are *ad idem* that moment a contract arises. If the offerer has launched an offer, can he complain that the acceptor did not acquire his knowledge of it from his messenger, but from some one else, if in the meantime he has not withdrawn it? This brings us to the question, what is the true purport of the rule that an offer may be treated as subsisting or continuing until, or in fact as being made at, the moment at which it is accepted? Is it not based upon the fact of the knowledge of the acceptor that the offer is being made, whether communicated directly to him by receipt of the offer, or indirectly by being told of it. He can take advantage, *ex necessitate*, only of that which comes to his knowledge, and of that which comes to his knowledge at the time of acceptance. If an offer, before reaching him, were modified, and he first acquired knowledge of it in its modified form, he could only accept it as modified. If he has knowledge of an offer for a length of time, and he concludes within a reasonable time to accept it, his position is that of a man who accepts instantly upon the offer being made, inasmuch as he may presume the offer to be made as much at the last moment as at the first moment of its coming to his knowledge. It is clear, therefore, that in the case of a deferred acceptance he acts upon such knowledge as he has, and he may in law presume that knowledge to be correct. In other words, he acts upon a presumption. Contracts by correspondence could not be made unless the offer was open until withdrawn or accepted, and although the offer is *de facto* made when signed by the offerer and despatched, it is *presumed* to be repeated constantly until withdrawn or accepted. The repetition at the last moment before acceptance is a pure but necessary fiction. It is so treated in the last edition of Chitty on Contract[4] where it is said, "But it appears that this rule (that the acceptor cannot make a binding contract by accepting after he knows of a prior sale) must be received with the following qualification, viz., that if an offer be made by letter to a party at a distance, it is *presumed* to be constantly repeated until the period for acceptance arrives, up to which period it is to be *inferred* that there is a continuation of the inten-

[4] D. P. 14.

tion of the contract; and that the acceptance of the exact terms proposed, within the period limited, shall form a complete contract as from the date of such acceptance, provided that the party making the offer has not in the interim withdrawn it." This agrees, though not in the exact mode of expression, with Sir William Anson's interpretation that the "*law regards* the offerer as making his offer during every instant of time that his letter is travelling." The repetition of the offer, then, is a mere presumption. The acceptor may act upon the repetition of the offer which is presumptively made the moment before he accepts, if he knows nothing to the contrary. But presumptions do not arise when the facts are known. There can be no presumption against fact. And if the fact is that the offerer has withdrawn his offer, or has made it impossible of acceptance, and so has impliedly or inferentially withdrawn it, the proposing acceptor cannot resort to the presumption or inference that it is being repeated every moment. He knows the contrary to be the fact, and as there was no obligation while the offer remained an offer either to continue or to repeat it, or to carry it out, there could be no liability for not consummating it. If there is no liability for not continuing the offer, is there any liability for not informing the proposed acceptor of the revocation. Clearly not, because if he had the knowledge from another source he could not be damaged. His action, after having received such knowledge from any source, would be purely voluntary, and not attributable in any way to the offerer.

It would seem, then, that there is a presumption of a repetition of the offer at the moment of the acceptance; and if the acceptor knows the fact to be that the offerer is not repeating the offer at that moment, he cannot act upon a presumption which would be against the fact. Indeed, there could be no presumption, for the fact is known, and the inference from the fact is that there is no offer being made. If that be a true analysis of the matter, it makes no difference whence the knowledge of withdrawal comes.

The fallacy, if there be one, is in treating the offerer as under an obligation to inform the proposed acceptor of the withdrawal if he would escape liability. As JAMES, L.J., puts it, "of course it may well be that one man is bound in some way or other to let the other man know that his mind with regard to this offer has

been changed." But the breach of such an obligation is not actionable. He runs a risk if he does not communicate his change of mind. He leaves the acceptor in a position to entitle him to rely on the offer. But this dictum cannot be taken in a sense contrary to the decision; for it was ultimately held that he was not bound though he had not himself communicated the change of mind to the acceptor.

The true position, if we may so denominate it, is that the proposed acceptor may act upon the offer as a repeated offer if he knows nothing to the contrary. Hence we may object to Sir William Anson's term "unauthorised communication," *i.e.*, a communication of retractation by some one other than the offerer. It implies that the offerer is held by his offer unless he personally withdraws and notifies the withdrawal, whereas he is not held by his offer at all before acceptance. We may also object to the pregnant suggestion of an obligation contained in the sentence already quoted, "the offerer had done nothing to communicate his intention to revoke, or his revocation, up to the moment of acceptance, yet he was held not to be bound." That assumes that he alone could communicate the revocation. There is probably no authority for the proposition that he must communicate the withdrawal or it would have been cited, though it must be admitted that he runs a risk if he does not. And it is against principle if the position of the proposed acceptor is correctly interpreted in the passage cited from Chitty.

That interpretation is consistent with the expression of LINDLEY, J., in *Byrne* v. *Van Tienhoven,* when he says that "both legal principle and practical convenience require that a person who has accepted an offer *not known to him* to have been revoked, shall be in a position safely to act," &c. There is no intimation here that the knowledge of retractation must come from the offerer or by his authority. Conversely, if the offer is known to have been revoked, the acceptor cannot act so as to bind the offerer. And this is exactly in accord with *Dickinson* v. *Dodds.*

It is further said that the following words by JAMES, L.J., in the latter case, are in direct conflict with those first quoted:—"I apprehend that there is neither principle nor authority for the proposition that there must be an actual and express withdrawal of

the offer, or what is called a retractation." It must be observed that this does not refer at all to the communication of the withdrawal. It does not, directly or indirectly, hint that the knowledge of withdrawal must be derived from the offerer, and therefore it does not affect the proposition in *Dickinson* v. *Dodds*, that the proposed acceptor cannot accept if he knows that the offer is not being continued. The learned Judge is here speaking of the supposed necessity for an express withdrawal, as by saying, "now I withdraw my offer." He says that is not necessary. The offer may be discontinued or withdrawn impliedly, as by death or disposal of the subject-matter. Still, the acceptor may accept if he does not know that the offer is withdrawn.

With some diffidence, therefore, we conclude that the first suggested distinction is not in reality a distinction, but is in fact expressive of the true rule as to acceptance, viz., that the proposed acceptor may act on the legal presumption that the offer is being repeated unless he knows the fact to be otherwise; that the offerer runs the risk of becoming liable if he does not see to it that the retractation is communicated to the proposed acceptor, but he is under no obligation to communicate the withdrawal if the proposed acceptor has already acquired the knowledge of it. We may also conclude that there is no conflict between the cases cited, for there is nothing in *Byrne* v. *Tienhoven* to indicate that the offerer alone must inform the proposed acceptor of his retractation. That case decides that the acceptor may act upon the offer in the condition in which it is or appears to be when he first acquires knowledge of it. *Dickinson* v. *Dodds* determines that if his knowledge of the offer is other than that which appears upon its face he cannot act upon an undoubted false appearance. Perhaps the terms "withdrawal," "retractation," and "revocation" should be abandoned as implying that the offerer releases himself only by directly taking from the proposed acceptor the right or privilege of further consideration.

Reference may now be had to Sir William Anson's query, whether the rule in *Dickinson* v. *Dodds* would apply to a contract for personal services. Suppose that an actor should offer his services by an offer which would be binding if accepted to a theatrical manager. While it is under consideration the actor

engages with another manager. The first manager goes to the theatre of his rival and sees the actor on the boards, and then ascertains that he has made a binding engagement. The next day he writes and accepts the actor's offer. It would be a surprise to be told that the actor was answerable for breach of contract. There could be no contract proper, for there was no *consensus* of minds. There would be no equity in favour of the manager; and there would be no liability on the part of the actor for not keeping his offer open. It would be difficult to find authority for the proposition that the actor had rendered himself liable for damages because he had not himself communicated his intention to revoke his first offer. It certainly does not appear from the case of *Byrne* v. *Van Tienhoven*.

Or, to put a more emphatic case recently mentioned to the writer. A man makes an offer of marriage. Before acceptance he marries someone else. The woman who received the first offer, on hearing of the marriage, accepts his offer, and immediately brings an action for breach. It is clear that the marriage is not a breach of a contract, for no contract existed when it took place. An unaccepted offer existed, but there was no obligation. Here damages would be the only relief, but this state of facts clearly exemplifies the relative position of the parties. In the case of the actor, the first manager could not restrain the actor from fulfilling an agreement entered into before the first manager had put himself in a position to demand relief of any kind. And as for damages, there could be no breach of a contract never made.

We may here consider the elements of an accepted offer, such as that in *Byrne* v. *Van Tienhoven*, which has been revoked by the offerer, unknown to the acceptor, before the acceptance. We have already stated that if the offerer changes his mind he runs a risk if he does not communicate it to the proposed acceptor. We shall have now to ascertain what that risk is. It is essential to a contract that there should be a *consensus* of minds. It is clear that in such a case as *Byrne* v. *Van Tienhoven* there is not the essential element of a contract, for at the time of the assent given by the acceptor, the mind of the offerer is opposed to him. There is, therefore, no *consensus*. At the Roman law the requisites of an agreement were several persons, a concurrence of wills, and a

declaration of the concurrence, promise, and acceptance. Where a proposal was made to a party at a distance revocation was allowed before the absentee had received the proposition, and that whether the revocation became known to him before or after his acceptance. This was the logical result of the requirements of an agreement, for there was no concurrence of wills if at the time of acceptance the offerer had changed his mind. A contrary view is taken by the English law. A revocation not known to the proposed acceptor is no revocation at all as regards him. But to allow an accepted offer to become a contract, when as a matter of fact the offerer had changed his mind before acceptance, is an anomaly. Perhaps the English law is more just in allowing the acceptor to take advantage of his acceptance, but the declaration of *consensus* contained in the offer and acceptance is untrue. The minds were not *ad idem* when the acceptance took place. Such a declaration is rather a quasi-contract. It bears the form of a contract, but does not contain the elements of one. There is an obligation arising out of the equity of the acceptor's claim, but the form of action is necessarily upon an accepted promise.

The true injury which is done to an acceptor who accepts without knowledge of a revocation is that he has been, by the combined action and inaction of the offerer, led to believethat he could make a binding contract. There was at common law, apparently, no form of action for such an injury. The case appears to have arisen for determination at a comparatively recent date. The form of action adopted in *Byrne* v. *Van Tienhoven* was apparently for breach of a contract. The measure of damages would in each case be the same; and the form of action adopted at the present day would be immaterial, if indeed it can be said that there is any particular form of action. It may also be a question whether the argument from convenience is founded upon true principles. The inconvenience which would arise from the application of the Roman rule would probably exceed that which would arise from the English rule. The very fact that the application of the rule is of so recent an origin shows that the cases must have been either very rare or of exceedingly small importance. The Roman rule was logical, severely so. The English rule is illogical as long as we regard the acceptance of a revoked offer as making a contract. If

we regard it as a quasi contract, and allow that the true relief is for a species of misrepresentation, the measure of damages being the same as for a breach of a true contract, then the symmetry of the law as to offer and acceptance is not disturbed.

If this analysis is correct, then the position of an offer accepted after knowledge of its cancellation is clear. There never is in such a case a *consensus* of minds, and the acceptor knows at the time of acceptance that there is no *consensus*. There is, therefore, the form of a contract, but it does not contain the essential elements, and the acceptor has no equity in his favour.

With respect to the second suggested distinction, viz., that it may be found in the fact that there was a sale of a specific thing, and that, possibly, the sale to another, by which the property is passed to him, is a sufficiently overt act to amount to notice of revocation. If the first suggested distinction is not a distinction, but an expression of the true rule, then the second becomes clear upon a like analysis. The subject-matter, if a specific thing as in *Dickinson* v. *Dodds*, is gone by sale to another, and that amounts to revocation, or a refusal to repeat the offer. But it cannot be contended that the mere sale to another is an overt act at all, unless it is open to the proposed acceptor. That is, the sale is not notice unless the proposed acceptor has knowledge of it. Sir William Anson refers to the suggestion of this made by the reporter in the head note; but as to this Benjamin says[5], "There is nothing in the judgment to warrant the statement in the head note:—'*Semble* tha sale of the property to a third person would of itself amount to a withdrawal of the offer, *even although the person to whom the offer was first made had no knowledge of the sale.*'" The act of sale to another is "overt" to the proposed acceptor, unless he knows of it. If he knows of it, he knows that he cannot act as though the offer were being repeated to him. And he knows that there never can be a *consensus* of minds. It is not necessary to make this distinction, however, if *Dickinson* v. *Dodds* has been correctly interpreted, though there are some considerations affecting the sale of a specific thing to which we shall now refer.

In *Dickinson* v. *Dodds* the relief asked was specific performance. The jurisdiction to order specific performance is discretionary, not

[5] P. 47.

in an arbitrary sense, but in the sense that if there is anything inequitable in the conduct of the plaintiff, that may induce the Court to refuse the relief sought. It is purely equitable, in that the Court will not grant the relief except upon equitable considerations. This ground is not referred to in the case, nor have we seen it mentioned elsewhere in connection with a like state of facts, and therefore it is referred to with great diffidence. But is it not abundantly clear that the plaintiff who accepts an offer which he knows cannot be fulfilled, is not entitled to come to the Court on equitable grounds to ask for the delivery in *specie* of that which has gone before his reach and the offerer's? Reference may also be had to *Potter* v. *Saunders*[6], where the Court had to deal with two contracts for the same land and enforced the first in point of time. Lord Justice MELLISH refers to this as a ground of the decision, and it appears that there is authority for it.

With regard to the last suggested distinction, namely, that where the parties are in direct communication the theory of the "continuing offer" does not hold. It would be difficult to sustain this. Contracts by correspondence are assimilated to the constituent elements of an agreement. If parties directly communicating with each other agree, there can be no retractation. If they negociate and pass backwards and forwards offers, counter-offers, and suggestions, it is only in degree, and not in principle, that such negotiations differ from negotiating by correspondence. Apart altogether from the fact that before they would be bound there must be a writing, except in cases of very slight importance, it is difficult to conceive how the rights of a third person could intervene, unless in the case of a shopman offering his wares to a number of customers, or an auctioneer who is repeating his offers to sell to everyone in the room.

In the case of a shopman the remark of Sir William Anson is very pertinent. "The judgments (in *Cook* v. *Oxley*) are even open to the construction that they regard Oxley's offer as no more than an invitation to do business on certain terms within a certain time; and not as an offer which, unless revoked, might be turned by acceptance into a binding contract." Whatever may be the legal obligation of a shopman who offers every one of his customers

[6] 6 Ha. 1.

present a certain amount of a certain commodity at a certain price, and who exhausts that particular commodity before he satisfies all his customers, there is no doubt that the common-sense interpretation of his offers would be that they were subject to the qualification that he was not to be sued for breach of contract. He is offering to do business as well as he is able, and to the extent to which he is able. But his position would be precarious if he assented to a request to sell a certain thing (under the value of £10), and then found he had it not. And if this may be done on a small scale, why not on a large?

With regard to sales by auction, they are said to be nothing more than offers and acceptances. The offers are, no doubt, understood to be made upon the understanding that if a better offer is made they will not be binding. Except in these two cases it is difficult to imagine how parties in direct communication could, before they separate with an agreement made, be affected by the interposition of a third party. But apart from the improbability in fact, is there any solid distinction between negotiations carried on across a table and those carried on by post?—*Canadian Law Times.*

NATIVE CUSTOMS AND THE COLONIAL COURTS.

The considerations involved in the existence of native customs of all kinds amongst native people, living within the jurisdiction of the Courts of this Colony, have again been brought prominently forward in a case quite lately decided by the unanimous judgment of the Bench of the Eastern Districts' Court. We regret that the space at our disposal admits of very brief reference. The case was that of *Malgas* v. *Gakawu*, which came before the Judges on appeal from the Court of the Resident Magistrate of Glen Grey. To this Magistrate, Mr. Jenner, the public are indebted for having elicited this judgment. The judgment is very short, but it is one of considerable importance, and is the last of a series of judgments upon very much the same point. This being the case, the law may be considered now as settled, and it remains to be seen whether the legislature will take any steps towards recognising and adopting native laws among natives. This is a very serious question, and

one which can only be answered after very anxious consideration indeed. We have several times referred to this question, particularly in Vol. II. and Vol. VI., and in Vol. VI. the reference is to this very case, *Malgas*, appellant, v. *Gakawu*, respondent. The Magistrate had refused to hear the case on the ground that, after the Judges' opinions expressed in two cases, *Frank* v. *Matchaba*, and *Nguma* v. *Seti Beko*, it was not likely they would sustain any judgment which might be given in the present case, which was really what is commonly known as a "dowry case." On appeal, the Judges directed the case to be sent back to the Magistrate, in order that evidence might be taken, and this having been done, the case again came up on appeal. The JUDGE PRESIDENT delivered judgment as follows:—"When the record first came before us, it was accompanied by no evidence, and only the Magistrate's note that he refused to hear the case; but inasmuch as there was nothing on the face of the summons to show that the contract declared on was illegal or immoral, we sent the case back for evidence. This evidence is now before us, from which it appears clear that Nobachu was not plaintiff's legal wife, but had only cohabited with him under native custom. The evidence also shows that the eight head of cattle were given as *lobola*, for the purpose of securing continuous cohabitation. This being so, the law assumes that they were given for an immoral consideration, which prevents their recovery. Whether the *lobola* was also intended to place the wife in the position of a slave, or a thing bought, is not important. The evidence in the present case goes far to support that view. It may, however, be that that evidence is incorrect, and *lobola* is given, as some contend, to guarantee the native husband's proper treatment of his native wife, and that the legislature therefore might, not unwisely, recognise such native marriages under certain conditions as legal. This, however, is a matter of policy upon which we express no opinion, and with which we have nothing to do. Applying the ordinary principles of law, we must regard *lobola* as a consideration given for future immoral cohabitation, and being therefore illegal, it cannot be recovered in a Court of law. That the Act of 1864 allowed the children, offspring of this cohabitation, to have rights in certain circumstances over their father's property, does not legalise the

native marriage, but only confers rights on the progeny of illicit intercourse, rights which the father of bastard children might legally, according to our law, confer, by will for instance, on his bastard issue. The appeal, therefore, must be dismissed with costs.

Mr. Justice JONES and Mr. Justice MAASDORP concurred.

This judgment, as we have already observed, really forms one of a string of decisions upon the same point, decided in the same way. It would be very difficult to get the legislature to go the length of legalising woman-buying, of putting the stamp of authority upon polygamy, and of opening the Courts of a civilised Government to the hearing and determining of all kinds of native cases, many turning upon questions of very doubtful public morality, and nearly all opposed to the progress of civilisation, since their tendency, indeed their apparent object, is to keep all native women in a condition of servitude, in which they are regarded as mere chattels devoid of any civil rights, incapable of holding property; in fact, as constituting a mercantile commodity, the subject of sale and barter. No matter how long this condition of things may have endured, no matter how deeply attached the natives themselves may be to such customs, there seems to be no satisfactory reason for adopting the suggestion of the JUDGE PRESIDENT that the legislature should recognise native "marriages," such as the one in question, as legal. By all means let natives who wish to do so cherish whatever customs and practices they may choose, and resort to their own Chiefs, Headmen, or other arbitrators, for the settlement of all disputes and questions of native law. But to impose upon the Courts of a civilised Government the duty of trying cases relating to "dowry," in the widest sense of the term, would be the deliberate recognition of polygamy, and also the indefinite postponement of the time when native women shall be released from their present level of almost hopeless degradation. In case this may be thought language too strong for the occasion, we will merely reply that so long as, whether she likes the prospect or not, any "unmarried" native girl may at any time be given up as a wife, one of two or more, to any man who will pay in cattle the price set upon her by her father, so long is the practice of *lobola* to be condemned. We are fully aware of the defences which are raised by ardent advocates

of what they believe are native customs which should be maintained. We are told that the cattle paid by one man to another for his daughter merely constitute a pledge for the fair treatment by the husband of his purchase. But we are disposed to dismiss such defences as being opposed to abundant evidence, and to assert that in fact a traffic is carried on in native females, which it is by no means the duty of our legislature to encourage.

This question of native customs was referred to in Vol II (for 1885), p. 72, of the *Cape Law Journal.* There a case had been on appeal before the Queenstown Circuit Court, where the plaintiff sought to recover from the defendant certain stock on the ground that several years previously he had lent the defendant a heifer in accordance with a Kafir custom called *ubulungu.* We then explained that by this custom one Kafir will lend another an animal on the understanding that at any time thereafter he may take it and all its offspring into his own possession. It was also stated that an animal is generally given in this way to a married woman by her father, or by the person receiving payment for her from her husband. The JUDGE PRESIDENT, in dealing with an exception to the jurisdiction of the Magistrate on the ground that he had no power to try a case in which a Kafir custom was involved, said that, provided there were nothing opposed to public policy or to morality in a native custom which might be the ground of an action, Magistrates need have no difficulty. It was simply a matter of contract, and the Magistrate had only to determine whether the parties had contracted for the performance of a particular thing according to the custom.

The case of *Sengane* v. *Gondele,* 1 E.D.C., p. 195, may be referred to as the leading case upon the present question. This was an action brought by the heir of a deceased native for the recovery of cattle which had been given by the deceased for a wife, who after his death returned to her own people. The Court held, according to the headnote, that cattle given according to the native marriage customs as "dowry" are not "property belonging to the deceased at the time of his death," within the meaning of the Native Succession Act No. 18, 1864, to be administered and distributed according to native custom and usage; and they cannot be recovered by the heir of the deceased husband in the event of

the widow returning to her own people. A further headnote adds that the Native Succession Act recognises polygamous marriages by natives only so far as to say that where a native does enter into such marriages, and does not marry according to Colonial Law, and then dies, that his implied will or testament shall be taken to be a distribution of his property according to native custom. In that case the Rev. J. A. Chalmers, an eminent authority on the subject, gave evidence on *lobola*, or, as it should be called, *ukulobola*. The reported case has appended some notes on native customs supplied by the Rev. J. A. Chalmers, and the judgments there reported strongly support our contention that the legislature should not interfere.

In *Tabata* v. *Tabata*, 5 Juta, 328, the CHIEF JUSTICE in delivering judgment laid down that the Supreme Court had never had any jurisdiction to decide disputes between natives according to native law and custom. That is an authoritative decision which, in the interests of the native people themselves, we should be very sorry to see interfered with.

EMBRACERY.

At the Central Criminal Court, London, last month, one James Baker was tried on an indictment which charged him with having unlawfully and knowingly attempted and endeavoured to corrupt a jury sworn to give a true verdict according to the evidence in an issue joined between the *Queen* v. *Bernard Boaler* for libel, and to incline the jury more favourably to the said Bernard Boaler, by persuasions, entreaties, entertainments, and other unlawful means, and so committing acts of embracery. On behalf of the accused, objection was taken to the form of the indictment on three grounds, first, that the jurors alleged to have been embraced were not mentioned specifically; secondly, because the means of corruption were not sufficiently stated; and thirdly, that the words "and other unlawful means" were too vague. In support of the objection it was argued that the word "entertainment" was one of the vaguest in the English language. Its dictionary meaning was hospitable treatment, a feast, a treat, amusement, diversion, recreation, dramatic performance, and a farce. Besides, the jurors

embraced were equally guilty with the person embracing them, and were liable to a punishment of fine or imprisonment, perpetual infamy, and forfeiture of a tenth. The Recorder said there was no authority in the office or precedent for drawing the indictment in question, as no such case had ever been brought before to that Court. He found that from the time of Henry VIII to the present time the language in regard to this offence was singularly uniform. In every instance the authorities spoke of the individual embraced, and not of jurors as a body, and under these circumstances he held the indictment bad and quashed it.

In Wharton's Law Lexicon an *Embraceor* is defined to be "he that, when a matter is in trial between party and party, comes to the bar with one of the parties, having received some reward so to do, and speaks in the case; or privately labours the jury, or stands in the Court to survey and overlook them, whereby they are awed or influenced, or put in fear or doubt of the matter (19 Hen. VII, C. 13; *Termes de la Ley*). But counsel, attorneys, &c., may speak in the case for their clients and not be embracers." The same authority defines "Embracery" as "an attempt to influence a jury corruptly in favour of one party in a trial, by promises, persuasions, entreaties, money, entertainments, and the like. The punishment for this misdemeanour in the person embracing and the juror embraced is, by the common law, and also by Statute 6, Geo. IV, C. 50, § 51, fine and imprisonment.

This crime is comprised in Sir James Stephen's Digest of the Criminal Law, Chap. XIII (Bribery and Corruption—Sale of Offices), Article 128: "Everyone commits the misdemeanour called embracery, who by any means whatever, except the production of evidence and argument in open Court, attempts to influence or instruct any juryman, or incline him to be more favourable to the one side than to the other, in any judicial proceeding, whether any verdict is given or not, and whether such verdict, if given, is true or false."*

In Roscoe's Digest of the Law of Evidence in Criminal Cases, "Embracery" comes under the general head of "Maintenance," &c. The author lays down that embracery is another species of

*1 Hawk. P.C. 466; 1 Russ. Cr. 264.

maintenance. Any attempt to corrupt, or influence, or instruct a jury, or to incline them to be more favourable to one side than the other by money, promises, letters, threats, or persuasions, except only by the strength of the evidence, and the arguments of counsel in open Court at the trial of the cause, is an act of embracery; whether the jurors gave any verdict or not, and whether the verdict given be true or false (Hawk. P.C., b. 1, C. 85, § 1). The giving of money to a juror after the verdict, without any preceding contract is an offence savouring of embracery; but it is otherwise of the payment of a juror's travelling expenses (*Id.*, § 3). Embracery is punishable by fine and imprisonment (*Ibid*, § 7). Roscoe further lays it down that analagous to the offence of embracery, is that of persuading, or endeavouring to persuade, a witness from attending to give evidence, an offence punishable with fine and imprisonment. It is not material that the attempt has been unsuccessful (Hawk. P.C., b. 1., c. 21, § 15; *R.* v. *Lawley*, 2 Str., 904; 1 Russ. Cri. 361, 5th Ed.)

In the present case the Recorder of London, quashed the indictment, because in the form of the indictment there was a marked departure from established precedents as disclosed in former indictments. The person who drew the indictment would appear not to have consulted the statutes, or precedents in the shape of former indictments, but to have contented himself with the widest and most vague phraseology. Otherwise a very interesting trial might have resulted. In these modern times it would be well to know how far interested parties may go without being in law guilty of an attempt to corrupt, influence, or instruct a jury, as also at what stage a juryman may become a *particeps criminis*. In this country it may be assumed that any serious tampering with a jury would be dealt with as *Contempt of Court* merely, and presumably, also, a corrupted jurymen would be considered the less guilty of the parties. There is something salutary in this old law which, in the case quoted, has been dragged into the light of day. Attempts to influence individuals of a jury are not altogether unknown, and to provide for their suppression by legislative enactment would possibly serve to impress upon the public mind the sacredness of the administration of justice.

OBITUARY.

MR. FRANCIS BROWN.

We have to record the death, which occurred at Kimberley on the sixth of last December, of Mr. Francis Brown, who for some years enjoyed a leading practice at the Bar of the Eastern Districts' Court, who was for some time Recorder of Kimberley, and who, on relinquishing that appointment, again enjoyed a leading practice until a comparatively recent date. Mr. Brown, who was only forty-four years of age at the time of his death, will long be remembered, not only as a leading counsel, but also as a generous, warm-hearted friend. Of a genial and kindly temperament, Mr. Brown commenced his career with every prospect of achieving the highest distinctions attainable through the Bar. The fact that at the early age of thirty-four he became Recorder of Kimberley, practically on his own terms, and really yielding to the strong persuasion of the then Attorney-General, Mr., now Sir, Thomas Upington, is sufficient proof of his conspicuous ability. Although he resigned the appointment after about six months' tenure, he did so purely for domestic reasons. That he satisfactorily performed the duties of a Judge, sitting alone in times of great pressure and responsibility, no one has ever doubted. And when, some years later (Sept., 1882), the three-Judge Court was established at Kimberley, Mr. Brown was offered the position of Judge President, but declined it after some days' consideration, for the same reasons as those for which he had resigned the Recordership in 1880. There can be no question that in Mr. Francis Brown the country has lost one who was distinguished for profound learning, coupled with the highest abilities to be found at the Bar. He never gave up a case as hopeless. With the most dogged pertinacity, he would labour to make the most of the merest shred of a defence, and this happy faculty resulted over and over again in his winning verdicts from juries in criminal defences where the facts seemed overwhelmingly strong against his client. A few months before his death, owing to failing health, Mr. Brown had gone to Kimberley, the scene of his brief judicial career, and occasionally practised in the High Court. He will long be remembered more particularly

throughout the Eastern Districts of the Colony, where for so many years he travelled on Circuit.

The late Mr. Francis Brown was the son of Mr. William Thomas Brown, Surveyor, of Graaff-Reinet, and was born in the year 1846. He was educated at the Graaff-Reinet College, of which he became a distinguished pupil. He gained numerous bursaries, and in a competition of schools at Graaff-Reinet College, which took place in 1864, he was first in mathematics, for which he was awarded a medal. Amongst many prizes which he gained of the more important was the Stockenstrom Prize, in 1865, and First Prize in Literature, in 1866. In January, 1867, he was awarded the Second Class Certificate in Literature and Science by the Board of Public Examiners; and in January, 1869, a First Class Certificate in Law and Jurisprudence. This last-named certificate bears the autograph signature of the Hon. William Porter as examiner in Law and Jurisprudence. Admitted an Advocate of the Eastern Districts' Court on February, 15th, 1869, and of the Supreme Court, in March, 1870, Mr. Brown practised in the Eastern Districts' Court, and travelled that Circuit. He married, in 1873, Elizabeth Mary, daughter of the late Edward Irving, Esq., C.E., of Port Alfred. In April, 1880, he was appointed Recorder of Kimberley, but relinquished the office about six months later. In September, 1882, he was, on the creation of the three-Judge High Court, offered the Judge-Presidentship, but declined it. Mr. Brown was, further, one of the Board of Examiners of the Supreme and Eastern Districts' Court, for the examination of candidates for the profession of attorney and conveyancer.

REVIEW.

THE LAW OF TORTS.*

We have received a copy of the second edition of Sir Frederick Pollock's well-known work on the Law of Torts. The first edition

*A treatise on the Principles of Obligations arising from civil wrongs in the Common Law: to which is added the Draft of a Code of Civil Wrongs, prepared for the Government of India. By Sir Frederick Pollock, Bart., of Lincoln's Inn, Barrister-at-Law, Corpus Professor of Jurisprudence in the University of Oxford, Late Fellow of Trinity College, Cambridge, and Honorary Doctor of Laws in the University of Edinburgh. Second Edition. London: Stevens & Sons, Limited.

appeared in 1886, and accordingly it is not surprising that this second edition should have been issued at Easter of last year. The author states in the advertisement to this edition that the work has been revised with regard to recent decisions, and that several pages of the chapter on "Negligence" have been re-written. "Pollock on Torts" is too well-known to require any elaborate reference on the appearance of a new edition, because there are probably very few lawyers who do not possess the volume. The new edition is larger by one hundred pages than its predecessor, mainly owing to the addition of the Draft Code of Civil Wrongs for India. The four appendices to the first volume re-appear. In re-writing the chapter on "Negligence," the author has condensed instead of expanding his chapter on this subject. Indeed, having regard to the fact that the references to the Law Journal are stated to have been brought down to date, the second edition of Sir Frederick Pollock's work on Torts is a very healthful example to the authors of text books at large who, in so many instances, seem to think that each successive issue of their volume is expected to be more bulky than its predecessor. Now, it is observable that, in re-writing his chapter on "Negligence," Sir Frederick Pollock has actually produced a shorter chapter than that in the first edition of 1886, notwithstanding that cases decided in the interim are all, presumably, treated of. The case of the *Bernina* (1887), 12 P.D. 36, 56 L.J.P. 38, is cited at p. 397, as a leading case on the doctrine of contributory negligence, the author considers the word "proximate" is dangerously ambiguous when used in a special emphatic sense without further, or otherwise, marking the difference, and suggests the word "decisive" as likely to avoid the danger. "It would seem (p. 401) that a person who has by his own act or default deprived himself of ordinary ability to avoid the consequences of another's negligence can be in no better position than if, having such ability, he had failed to avoid them; unless, indeed, the other has notice of his inability in time to use care appropriate to the emergency; in which case the failure to use that care is the decisive negligence." The volume is, of course, exceedingly well got up, and the pages are cut. Mr. Dighton Pollock has assisted in the revision and enlargement of the Index.

DIGEST OF CASES.

SUPREME COURT.

Standard Bank v. Union Boating Co. (Oct. 28-Nov. 20.—A firm of merchants delivered wool to a Boating Co., and obtained from the Boating Co. a written undertaking to hold the said wool at the disposal of the plaintiff Bank. These undertakings were given for the purpose of enabling the merchants to obtain advances thereon from the Bank. Some time after the Boating Co. shipped the wool upon the order of the merchants, but without the consent or knowledge of the Bank. *Held*, that the Boating Co. were liable to the Bank upon their undertakings. The shipping clerk of the Boating Co. also gave the merchant similar undertakings to hold certain wool at the disposal of the Bank, but no such wool was ever delivered by the merchant to the Boating Co. Advances were made by the Bank to the merchant upon these undertakings. *Held*, that the clerk had no authority to bind the Boating Co. where no wool was actually received, and consequently there was no liability upon the Boating Co. to the Bank upon these latter documents.

Hollis v. Chase. (Oct. 30-Nov. 24.)—Where judgment against the defendant was given in the Magistrate's Court, and, on appeal noted, the Court ordered the judgment to be carried into execution or security given, and the defendant failed to satisfy the judgment, or to give security, and made return of *nulla bona* to a writ, the Court refused to set aside a summons for civil imprisonment taken out by the plaintiff, notwithstanding that the appeal had not been heard.

Queen v. Klein. (Oct. 30-Dec. 2).—An insolvent was charged with culpable insolvency under the 71st Section of the Ordinance, in having contracted a debt well knowing his estate was insolvent, and without having any reasonable or probable expectation at the time of contracting the said debt of being able to pay the same. From the evidence it appeared the accused had bought certain goods from a merchant at Port Elizabeth, and had the goods sent up country by rail. Not being paid for them, the merchant followed up and recovered possession of his goods and cancelled the transaction. Accused's estate was subsequently sequestrated, but no claim in respect of these goods was made in insolvency. *Held* (on point reserved from Circuit) that no conviction could be had, as the section of the Ordinance in question referred only to debts proved in the insolvent estate.

Badenhorst v. Incorporated Law Society. (Nov. 20).—An articled clerk was placed by the attorney to whom he was articled in charge of a branch business in a town other than that in which the attorney himself resided. The attorney corresponded with the articled clerk, and visited him once or twice a month to supervise his work. *Held*, that this was not such service by the clerk or instruction by the attorney as to entitle such clerk to admission as an attorney of the Court.

District Waterworks Company v. Executors of Elders. (Nov. 21.)—The late Elders and others, who had formed themselves into a committee for the purpose, purchased from one C some land for a burial ground. Interments took place therein for some years. C afterwards became insolvent, no transfer of the land having been effected. All the property in his estate was sold to O, who obtained transfer, and subsequently he again transferred to applicants. As interments were continued, applicants obtained a *rule nisi* calling upon the committee to show cause why they should not be restrained from allowing further burials. It was contended for respondents that the land had become "religious" and could

not be alienated, and consequently the property remained in C's estate, which could not set up any right against the committee, and that no transfer was necessary of property dedicated as *religiosæ*. Rule made absolute, the Court holding that, though the committee might have the right to prevent desecration of the grave-yard, they had no right to go against the wish of the owner and continue to bury, or to sell the right to bury, therein.

Queen v. Samaai. (Nov. 25).—The accused was convicted by a Magistrate of the crime of theft, in inciting K to steal some forage. The theft of the forage was proved *aliunde*, but K alone gave evidence implicating the accused in the crime. On review (under Rule 190), the Court refused to set aside the conviction.

Dutch Reformed Church of Steytlerville v. Village Management Board. (Nov. 25).—The village of Steytlerville was established by the Dutch Reformed Church, and erven were granted by the Consistory, with certain rights on commonage. On the creation of a Village Management Board, certain regulations were made. *Held*, that regulations authorising impounding of stock trespassing, and protecting fences and trees planted in the streets, were not *ultra vires*, as not interfering with the proprietary rights of the Consistory; but that regulations authorising the quarrying of stone, the cutting of wood, and the vesting in the owner of the adjoining erven the trees planted in the public streets, were *ultra vires* of the Management Board.

Willowmore Municipality v. Matthews. (Nov. 26).—The Municipal Board instructed their market-master not to take bids of less than 3d. each when articles were sold on the market by the 100 lbs. Respondent offered a bid of 1d. on 7s. for a bag of potatoes, and on the market-master refusing the same, he sued him for 10s. damages in the Magistrate's Court. The Magistrate gave judgment for the respondent, on the grouud that the instructions amounted to a Municipal Regulation, which, to have validity, must be approved by the Governor, and promulgated in the *Gazette*. An appeal allowed, the Court holding that this was a mere detail of management, and was as much within the control of the Municipality as would be the fixing of the spot where any produce should be sold.

Durr v. Bam.—An auctioneer sold at public auction for the defendant a cow, subject to the written conditions of sale read out at the time. During the bidding the defendant made certain statements, which the auctioneer repeated, as to when the cow would calve. The plaintiff bought the cow, but as she did not calve till some considerable time, afterwards he sued in the Magistrate's Court, and recovered judgment cancelling the sale, and for damages. There was no allegation of fraud, and it was shown that the defendant had grounds for believing his statement to be true. On appeal, the judgment was reversed, the Court holding that if during a sale the auctioneer made certain statements, they must be taken as mere representations, and not qualifying the conditions, unless it could be shewn that the representations were made falsely and fraudulently.

Liquidators Cape of Good Hope Bank v. Forde & Co. (Nov. 27).—Before its stoppage the Bank had discounted a promissory note, payable by Forde & Co. Miss Forde having money on fixed deposit, by a collateral agreement, pledged the deposit receipt as security for the promissory note, which was payable by her father and brother. The Liquidators of the Bank now sued on the note, against which the defendants sought to set off the amount of the fixed deposit. *Held*, that there was no right of set-off.

Pentz v. Colonial Government. (Nov. 28-Dec. 1).—The plaintiff alleged that in 1870, while residing at Heidelberg, in the Colony, he had received as a keepsake a stone which he thought was a topaz. On going to the Diamond Fields in 1889, he discovered it was a diamond, and he at once took it to the Detective Department until he could obtain a licence for it. The Detective Department made enquiries from which they were satisfied that plaintiff's account as to the

way in which he had become possessed of the stone was not accurate, but they did not attempt to prosecute plaintiff under the Diamond Trade Act. They refused to return the stone, whereupon plaintiff now sued the Government for the same or for the payment of its value. The Detective Department now called evidence to contradict plaintiff's account of how he became possessed of the stone. The Court held the plaintiff entitled to judgment, as the Detective Department, having received the stone from the plaintiff, were bound to return it unless they were prepared to prove that the diamond was stolen or was otherwise in the illegal possession of the plaintiff.

Tilney v. Heynes. (Dec. 1).—The defendant having a span of mules for sale, took them to a stock sale advertised to be held by plaintiff. Before the sale, and without the intervention of the auctioneer, defendant sold the span provisionally for £120, on condition that no higher bid was made at the sale. The auctioneer put up the mules, but could not effect a sale, and the defendant afterwards completed the provisional transaction. The auctioneer held not entitled to commission on the sale.

McDonald v. Port Elizabeth Municipality (Dec. 1).—On the 12th December, the Railway Department gave notice to appellant that they intended to expropriate his property. Negotiations ensued, and on the 14th May following, the amount of compensation was settled, and thereafter transfer was given to Government. On the 26th February previous, the Municipality assessed a landlord's rate, and appellant being at the time the registered owner of the property, was sued for the same. The Magistrate gave judgment against appellant, holding him liable for the rate. An appeal against this decision dismissed.

Bataza v. Mozaka. (Dec. 2).—The plaintiff, a native, left with one T'Seio seven head of cattle, as a means of subsistence for plaintiff's mother. Plaintiff removed from the Colony for some time. On his return he found both his mother and T'Seio dead. Defendant as heir, according to Kafir custom, to T'Seio had taken possession of the property. Two of the cattle had died during T'Seio's lifetime, one was slaughtered for his death rites, and four head remained with defendant. The plaintiff sued in the Magistrate's Court, and after hearing evidence of native custom, the Magistrate gave judgment for plaintiff for the seven head. On appeal the Court reduced the judgment to five head, this being an *actio rei vindicatio*, and that number of cattle only having been traced to defendant.

Le Roux v. Hofmeister. (Dec. 2).—The plaintiff recovered judgment in the Magistrate's Court upon an account for goods sold and delivered, when the Magistrate, without hearing evidence, directed that the amount should be paid in monthly instalments of £1 each. On appeal, this part of the judgment was set aside, on the ground that *prima facie* a person who obtained a judgment was entitled to immediate payment, and it lay upon the defendant to show cause why this rule should be departed from. At the request of parties, however, the case was remitted to the Magistrate's Court for evidence as to the capacity to pay of the defendant.

Solomon & Co. v. Kossult. (Dec. 3).—Plaintiff sued for £500 damages for breach of an agreement by defendant to lend £500 to plaintiff. Defendant pleaded that he had been misled as to plaintiffs' position by their misrepresentations which, when discovered, had caused him to withhold the loan. Plaintiffs called evidence to shew injury to their credit through not being placed in funds to pay certain due debts. The plaintiff had, for the purpose of the loan, insured his life, and paid £8 12s. 6d. premiums, and had ceded the policy to defendant. The Court held other damages too remote, but gave judgment for the £8 12s. 6d., which, by defendant's withdrawal, had become lost to plaintiffs.

Liquidators Cape Central Railway Co. v. Nothling. (Dec. 4).—The railway was constructed on land expropriated by, and belonging to, the Company adjoining respondents' property. The line was fenced in, but respondent's cows got on to the line and were run over and killed. Respondent recovered judgment in the Magistrate's Court for the value of the cows, the Magistrate holding that the fencing was defective, and also that with ordinary care and precaution the engine-driver might have avoided the accident. On appeal, the Court refused to disturb the judgment, as there was evidence to support the finding of negligence on the part of the engine-driver, but held, that the statutory provisions of Act No. 19, 1861, § 29, did not subject the Company to any other liability than for the penalty therein imposed for a breach of duty in fencing, which penalty was recoverable at the suit of the Attorney-General.

Green & Co. v Beveridge. (Dec. 4).—Defendant became surety for one Briggs to the plaintiffs, the bond stating that defendant bound himself "for any sum not exceeding £200 due by Briggs to Green & Co. under renunciation of the exception *ordinis seu excussionis*, which aforesaid sum of £200, or any lesser sum which may be due, the appearer promises and undertakes to pay to Green & Co on demand." Briggs had surrendered his estate, and plaintiffs sued for provisional sentence for £200. *Held*, that this was not a liquid document upon which provision could be granted.

Fischer v. Liquidators of the Union Bank. (Dec. 5-9).—Applicant and his brother were heirs under their father's will. In the estate were certain shares in the Union Bank. The executors realised all the assets except these shares, and paid to the sons the amount realised. Some time after, as the shares could not be disposed of, to close the estate the executors transferred half of them to each of the sons. The applicant was never informed of this, never took up the shares, the scrip of which remained in the bank, or received any dividends thereon, and never signed the trust deed. An application to remove his name from the list of contributories granted.

Sea Point Municipality v. Metropo itan Railway. (Dec. 11).—The Railway Co., on applying for an incorporating and empowering Act, lodged certain plans of the proposed route of the railway with Parliament. The Municipality objected to part of the route as prejudicial to the welfare of the inhabitants. The promoters of the Railway Co. met the Municipal Commissioners on the ground and certain deviations were agreed to between them. To prevent delay, however, it was agreed not to require an amendment of the plans lodged with Parliament. The Act was passed, authorising the construction of the line in accordance with the plans. In construction, these plans were followed, contrary to the agreement with the Commissioners. The Commissioners now applied for an interdict, but it was held that the Court could not restrain the Company from constructing the line authorised to be constructed by Parliament.

Re Mackenzie. (Dec. 11).—*Semble*, that though the Supreme Court has power of review over the Court of the Chief Magistrate of the Transkei, there is no right of appeal from that Court in a case which had been heard in the first instance in a Magistrate's Court, and from which an appeal had been had to the Chief Magistrate.

Heirs of Adam Kok v. Colonial Government. (Dec. 15).—*Held*, that the amounts of the annual contributions settled by various treaties between the High Commissioner and the late Griqua Chief Adam Kok, to be paid in perpetuity, were monies payable to Captain Adam Kok, or his successors in office, and that the personal heirs of the late Chief were not entitled thereto.

L. and S. A. Exploration Company v. Bultfontein Mining Co. (Dec. 16-17).—The plaintiff company having recognised the proclamation of Bultfontein as a diamond mine, and the creation of a Mining Board for such mine, and having

granted leases upon that basis, *Held*, that they were not now entitled to question the legality of the Governor's Proclamation, or that the Mining Board was duly constituted.

Faure v. Divisional Council of Pulbagh. (Dec. 23).—Appellant married the widow of the late Malherbe, and after marriage resided on a farm which was in the joint estate, and paid the rates levied thereon. He was now sued in the Magistrate's Court for rates levied before his marriage. *Held*, that in the absence of evidence to the contrary, the Magistrate was justified in holding that the marriage was in community of property, but that the appellant was not liable for the rates, it not having been shown that Malherbe's estate could not pay them, or that the rates were a debt due by the widow whom applicant had married.

NOTES.

The post of Parliamentary Draftsman is one to which in times past it has been the privilege of the Bar, generally of the Capetown Bar, to aspire. This important office is in the gift of Mr. Speaker, at whose nod, whenever a vacancy may occur, a deserving barrister may be provided with work to do in drafting bills in Parliament, and, moreover, be enriched to the extent of four hundred pounds a year for doing it.

The last occupant of this responsible office was Mr. Schreiner, who is understood to have relinquished his appointment, and its emolument, at the beginning of the present year, and immediately the eyes of all men in practice at the Colonial Bar were turned to Capetown.

Towards the end of January it was announced that Mr. McGregor, of the Orange Free State Bar, had been appointed to the position of Parliamentary Draftsman, and thereupon such an outcry was raised, not alone at the Bar of Capetown, but also in the Press, as caused Mr. McGregor to remain at Bloemfontein.

The *Cape Times* even gave publicity to a poem presumably the handiwork of one of the Capetown Bar. This poem bore abundant testimony to the belief current in lay circles that the calling of a barrister is prosaic. The author was apparently completely unmanned when he compounded the several stanzas of this work, whose object was apparently to condemn the Attorney-General to the unutterable, and announce to the world at large that the Bar renounced him as its leader, since he had betrayed his solemn trust

to be true to the interests of the Poet and his co-practitioners, but particularly to the Poet.

The Poem is entitled "The Lost Leader;" and all is so good that it is hard to reject any of it, but we may only give the first and last verses in full:

"Just at the power of office he left us,
Just at the nod from his leader outside,
Gained the one honour which merit rewarded,
Losing all others we thought would abide;
They, with their pressure political forced him,
So much was their's who his office allowed,
How all our good words had gone for his promotion,
Good words—e'en from juniors his heart had been proud.'

The second verse hints ominously at his (the Attorney-General's) base deception in having made "us" think him a "pattern to live and to die," and then in equally beautiful language reference is made to traditions established by "Chris." Brand, Porter, De Villiers and Griffiths, of whom the author declares that "they watch us now from far."

The third verse opens with a welcome rift in the clouds of grief and despair, perhaps in consequence of the cheering reflection as to former Attorney-Generals that "they watch us now from far," for the Poet asserts quite boldly that "we shall rally again—but not under his guidance." As to *him*, we are told to

"Blot out his name, record one lost leader more,
A job perpetrated a bright future to mar."

But the promise of better things foreshadowed in the picturesque lines of verse 3, seems to be fully realised in verse 4, as follows:—

"Life's night begins. Let him never come back to us,
There would be doubt, hesitation and pain,
Forced praise on our part—the glimmer of twilight,
Never glad confident morning again.
Best fight on alone – retribution will meet him,
Clouds are obscuring his now ascendant star,
First let him purge his default, and then let him meet us,
Forgiven his fall—and the first—by the Bar."

We close a reference to this rythmical production with a feeling of gratitude that clouds have not been permitted to obscure the "now ascendant star" of X, whose *forte*, if it be not law, is certainly poetry.

The appointment of Parliamentary Draftsman was offered to various members of the Bar, and Mr. Joubert, of Kimberley,

ultimately, has accepted. It is understood that a *sine qua non* in the matter is an intimate knowledge of Cape-Dutch, in which language alone some members of the Legislature can express themselves.

We are second to none in holding that, as far as possibly can be appointments to office in the Cape Colony should be given to those who have worked consistently in the Cape Colony. At the same time it is right to remember that the Cape Bar has supplied the present, as well as the late, President of the Orange Free State, most of the Judges of both the Free State and Transvaal, and a good number of the Bar in each of these States. Ten years ago Mr. James Buchanan was appointed to the Recordership of Kimberley, while in practice in the Free State, but otherwise the Bar has generally been equal to all calls made upon it to fill appointments in this Colony. In the present case we think that far too much fuss has been made about an altogether minor appointment.

The Journal of Jurisprudence and Scottish Law Magazine announces the admission to the Faculty of Advocates of seven new members, raising the number of counsel in daily attendance at the Parliament House to 203, a number greatly beyond precedent, and remarks that, while work is on the whole rather more widely distributed than it was formerly, professional success must still be the prize of the few.

In the course of a sermon delivered by the Bishop of St. John's, during the recent Provincial Synod at Capetown, on the subject of our duties towards the native races, the preacher is credited with the following somewhat crude, not to say contradictory, observations:—"We make peace, and we stop the cruel deaths inflicted on those who are supposed to be guilty of witchcraft, and all that is good; we take the government entirely out of their hands, and no doubt we govern with more even-handed justice than the native chiefs. Their courts of law are changed, and here comes in a clear loss; the people learn to employ our agents and lawyers, instead of each man using his own wit and powers of speech to defend his cause. Their minds are no longer employed in these suits, at which the encounter of wits used to be so keen; now unhappily they believe the longest purse wins." In illustration of the

Bishop's last remark we may state as a postive fact that over and over again, in Circuit Courts, the intended victim of deliberate perjury in charges so grave as those of murder, manslaughter, arson, &c., actually escapes ("unhappily," howsoever, it may be) in consequence of his ability to secure professional assistance in his defence. One interesting feature, among many, of pulpit oratory, is its freedom from such trammels as logic or consistency. Pondoland still presents the spectacle of native "courts of law," where many a poor victim has his mind employed in a suit in which the encounter of wits is "so keen." We would suggest to the Bishop to—*ask a Pondo.*

The *Canada Law Journal* for December mentions that the Minister of Justice had recently issued a Circular letter to Judges and Attorney-Generals of the various provinces of the Dominion, for the purpose of ascertaining their views on the important question whether Grand Juries should, or should not, be abolished. Long before the solitary Grand Jury which used to be summoned at Capetown was abolished, it was deemed of no practical value whatever. In no other part of the country did any demand for a Grand Jury arise. The fact is, that provided competent and reliable law officers are available, the charge of indictments is far safer in their hands. The Grand Jury of Capetown has not been missed, and it is not likely to be missed. It must be remembered, too, that in these days a person is generally, almost invariably, already under committal in a *prima facie* case, before any Bill is presented to the Grand Jury, in countries where the institution still lingers. The determination of the case is far better left to the jury who are sworn to try "without fear, favour, or prejudice," and to give a true verdict, according to the evidence.

The condition of affairs in the London Courts seems to continue to be ludicrously unsatisfactory. The *Law Times* continues its perennial complaints of absent Judges, aged and infirm Judges, Judges who sleep on the Bench, Judges on Circuit, &c., &c. Of late Judges have been dying, retiring, and being "promoted," a word which Sir JAMES HANNEN was guilty of using in his valedictory remarks to the Probate Division. The odd thing is that whenever one of the very infirm Judges happens to die, or to retire, the air

is at once filled with mournful panegyrics. Each one seems more indispensable than his predecessor in death or retirement. The Courts of late have been the scene of funereal and other orations generally of a very ordinary level and always full of "humbug."

CONTENTS OF EXCHANGES.

The Journal of Jurisprudence and Scottish Law Magazine, Vol. XXXIV. Nos. 408 and 409. For December, 1890, and January, 1891. Edinburgh: T. and T. Clark.

No. 408. Editorial—Speech as a Mode of Business—Judicial Slander—A Judge's Trial—Appointments—Obituary—The Month—Reviews—English Decisions—Index.

No. 409. Editorial—Railway Law of 1890—The Legal Culpability of the "Criminally Insane"—Speech as a Mode of Business—Appointments—Obituary—The Month—Reviews—English Decisions—Sheriff Court Reports.

The Canada Law Journal, Vol. XXVI, Nos. 16, 17, 19, and 20. For October, November and December, 1890. Toronto: The J. E. Bryant Co. (Ld.)

No. 16. Editorial—Comments on Current English Decisions—Notes on Exchanges—Reviews and Notices of Books—Diary for October—Early Notes of Canadian Cases—Osgoode Hall Library—Law Students' Department—Law Society of Upper Canada.

No. 17. Editorial—Comments on Current English Decisions—Correspondence—Notes on Exchanges, &c.—Diary for November—Reports—Early Notes of Canadian Cases—Practice—Law Students' Department.

No. 19. Editorial—Grand Juries—Comments on Recent English Decisions—Notes on Exchanges, &c.—Reviews and Notices of Books—Diary for December—Reports—Early Notes of Canadian Cases—Flotsam and Jetsam—Law Society of Upper Canada.

No 20. Editorial—Comments on Current English Decisions—Detection of Murder by Micro-Photography—Reviews and Notices of Books—Diary for December—Reports—Early Notes of Canadian Cases—Osgoode Hall Library—Index to Vol. XXVI—Table of Canadian Cases—Table of English Cases—Rules of Practice—Table of Statutes.

The Canadian Law Times, Vol. ,X No. 12. For October, 1890. Toronto: Carswell & Co.

Revocation of an Offer—Editorial Review—Book Review—Occasional Notes.

The Western Law Times, Vol. I, Nos. 7 and 8. For October and November, 1890. Winnipeg, Manitoba: The Stovel Company.

No. 7. The Canadian Commonwealth as it was, and is—Flotsam and Jetsam—English Decisions—Recent Decisions (Manitoba).

No. 8. The Sheriffs of Assiniboia—Notes and Comments—Flotsam and Jetsam—English Decisions—Books for Review—Recent Decisions (Manitoba).

THEMIS. *Verzameling van bijdragen tot de kennis van het Publiek-en Privaatrecht.* Vol. LI, No. 4, 1890. The Hague: Belinfante Brothers.

STAATSRECHT. *Overzicht van Rechterlijke Beslissingen betreffende publiek recht in Nederland*, by Mr. H. Vos—BURGERLIJK RECHT EN RECHTSVORDERING. *Is de Kantourechter-naar aanleiding van Artikel* 289, *Wetboek van Burgerlijke Rechtsvordering, in kort geding voor den President der Arrondissements-Recht bank verschenen —— partij in dat geding, zoodat hij in de kosten van het geding kan worden verweven?* by Mr. C. Krabbe — RECHTSGESCHIEDENIS. *Bijdragen tot de geschildenis der Nederlandsche financiën*, by Mr. F. N. Sickenga—*Zelfbestuur en kreisorganisatie in Pruissen*, by Mr. S. J. L. Van Aalten, junr.—*De gerechtelijke liquidatie volgens de fransche wet van* 4 *Maart*, 1889, Mr. W. Th. C. van Doorn—DE SPAANSCHE VERTALING VAN *De Huwelijks-flechtigheden en feesten bij de bewoners van Morlacca in Dalmatie*, by Dr. Vladimiro Pappafava.

Archiv für Burgerliches Recht, Vol. V, Part 1. For December, 1890. Berlin: Carl Heymanns.

Die rechtliche natur der offenen handelsgesellschaft. Dr. A. Affolter —*Die juristische konstruktion der dinglichen Rechte.* Dr. Hermann Staub—*Zwei Beiträge zum entwurf eines Bürgerlichen Gesetzbuches.* Judge Breitner—*Das Individualrecht als namenrecht.* Mr. J. Kohler—*Der neueste entwurf einer novelle zum Engelischen aktienrecht.* Dr. Hirschfeld.

NATAL LAW REPORTS, New Series, Vol. XI, Parts, 4, 5, and 6. For July, September and November, 1890. By W. Broome, Advocate, Natal: Horne Brothers, Maritzburg.

We have received from Dr. T. J. Barnardo, F.R.C.S., Stepney Causeway, London, E., a bulky pamphlet on the "Roddy Case," giving the arguments and judgment in the Appeal Court.

CORRESPONDENCE.—"Lex" writes asking for information as to whether there is any rule by which legal practitioners forego charges in respect of work done for brother practitioners. "Lex" also asks what has become of the Law Society. On the first point we have only to say that no rule compels the practitioners to show consideration; they are usually guided by circumstances. It is, we believe, unusual to make profit out of work done for brother practitioners. We have no information on the second point.—ED. *C. L. J.*

CAPE LAW JOURNAL.

THE THEORY OF THE JUDICIAL PRACTICE.

CHAPTER XVII.

Defaults.

It is not intended here to refer to all the minor defaults to which parties to an action are liable, and which can be gathered from the other subjects treated of; nor to a default in obeying an order of Court, which is treated of under the head of "Contempt of Court;" nor to a default in "Appeal," which is treated of under that heading; but only to the defaults of more general and frequent occurrence in actions.

A plaintiff, as well as a defendant, may be in default in an action.

1.—*As to the Default of a Plaintiff.*

Generally, a plaintiff may be in default in three ways:

1. When he has issued summons but does not proceed, or declare, thereon (this differs from "Perpetual Silence," which see further on).

2. When, after he has declared or made claim on the summons, he does not reply to the defendant's plea, or any further pleadings.

3. When his case is called on the roll and he does not appear, nor anyone for him (this is called "*Comparuit* Default.")

(*a*). In the first case, when a plaintiff has issued his summons and the defendant has entered appearance thereto, but the former does not proceed with his action, and declare and make claim "within the term next after that in which the action was commenced, or, in case the action shall have been commenced out of

term, then within the second term after the commencement of the action," the defendant may bar him from proceeding, and then move the Court, upon notice of motion, to "have judgment signed against the plaintiff for not proceeding in the said cause" (Rules of Court 25 and 330*a*). If the plaintiff opposes this application, then it is in the discretion of the Court to grant, or refuse, or postpone it, or to order him to declare, or make claim, on his summons by a fixed date, and to go to trial within a certain period. If he does not oppose the application, then it will be granted as a matter of course. But, whether the application is opposed or not, the effect of a judgment signed against a plaintiff for not declaring, or making claim, within the time fixed by the said Rules is tantamount to one of absolution from the instance; and the plaintiff may either, upon notice of motion to the defendant, ask the Court for leave to purge his default and to file his declaration, or he may, without previous notice, issue a fresh summons, and then begin his action *de novo*, upon first paying, of course, any costs the defendant may have been condemned in (*Eksteen* v. *Hayward & Higginson*, and *Potgieter & Tennant* v. *Meyer and another*, 3 Menz., 421, 438; *South-West Diamond Mining Co.* v. *Hall*, 1 Buch. App. C., 221).

(*b*). If, within the time fixed for the plaintiff to reply to any of the defendant's pleadings, he does not do so, he may, after the expiration of 24 hours after demand of such replication or other pleading, be barred from replying or filing any further pleading. He may, however, after such bar, upon 48 hours' notice to the defendant of an application to the Court or a Judge, obtain leave to purge his default, and to plead. On the other hand, he may also, before being barred, anticipate the defendant's proceeding to bar him, and ask the Court for an extension of time to declare, or make claim, or to plead. To obtain any of these privileges, he must satisfy the Court, or Judge, who has a wide discretion in the matter, upon an affidavit of merits, that his application is reasonable and just (Rules 21, 23, 26, 27 and 147).

(*c*). *Comparuit* Default.—This is when a case has been set down on the Roll for trial, and on the trial day, when the case is called, the plaintiff fails to appear, or anyone on his behalf, he is held to be in default, whereupon the defendant claims *Comparuit*, that is, for a declaration that he duly appeared on the case being

called, and was prepared to proceed with the trial to answer the plaintiff's claim or demand, but that he cannot by reason of the plaintiff's default.

The benefit to the defendant of this claim is absolution from the instance of the plaintiff's claim, with costs of the action. If the plaintiff, after this, wishes to proceed again against the defendant, he must begin *de novo* by issuing fresh summons, &c., and proceed in the same manner as if he had taken no steps in the matter before; and provided, also, that he first pays the defendant his costs of *Comparuit* in the former case (Van der Linden Jud. Prac. 1, 2, 3, 9; and *Van der Liet* v. *Executors of Karnspeck*, 3 Menz., 395; and *Horst* v. *De Villiers*, 1 Menz., 126).

This privilege of *Comparuit* applies to *all* the Courts in the Colony, and the 177th Rule of Court specially applies to Circuit Court *Comparuits*, in which the Court may, on sufficient cause shewn, postpone the case, or make other order therein.

If the defendant should also be in default, he has nothing to complain of; but if, though appearing, he should omit, or neglect, to apply for the benefit of *Comparuit* when the case is called, he may afterwards, by notice of motion, call upon the plaintiff for the payment of his costs of action, whereupon the Court may either grant the application, or make such other order thereon as, under the circumstances, may seem reasonable; and if the Court should order the plaintiff to proceed to trial by a certain day, the defendant would be entitled to his costs of the day in appearing when the case was called, and to the costs of the application (See Chapter on "Costs"). No appeal is allowed from any sentence given against a party by his default (Van der Linden, Law of Holland, 23, 1, 5, 5).

2.—*Default of a Defendant.*

The elaborate system of defaults of a defendant formerly in use has been done away with by the 273rd Rule of Court. In the Chapter on "Edictal Citations," I have treated of the defaults of a defendant who is either out of the jurisdiction of the Court, or, if still within the jurisdiction, cannot be found to be served with any legal process.

Under the present heading, I shall treat of the defaults of a defendant, who is within the jurisdiction of the Court, and who

can be duly served with any legal process. Such defaults are of two kinds: (*a*) when the defendant has entered no appearance to the action, and (*b*) when he has entered appearance.

(*a*). Under the old practice, whether a defendant has entered appearance or not, but does not defend, the plaintiff was bound to prove his case to the satisfaction of the Court, in the same manner as if the defendant were defending it. But this costly, and frequently useless, proceeding has been done away with in almost all but actions for damages and divorce, &c., which must still be proved to the satisfaction of the Court, though the defendant be in default. But, by the 329th Rule of Court, if a defendant does not enter appearance within four days after the day prescribed in the summons for entering appearance, the plaintiff may, if his action is *for a debt, or a liquidated demand only*, set the case down for judgment on the summons, without any notice to the defendant. But such a judgment is, in the first instance, provisional in its nature, for the Court may set it aside, and allow the defendant to purge his default and defend the action, "upon sufficient cause shewn, and upon such terms as to costs, or otherwise, as the Court may deem expedient."

As to what amounts to "sufficient cause" is entirely in the discretion of the Court, who must be satisfied that the defendant has a *bona fide* defence to the action, and that he has adduced sufficient grounds upon the merits to justify them in re-opening the case; he must shew, also, that he has not unnecessarily delayed in his application, but that he moved at the earliest opportunity, and within a reasonable time; otherwise, he would be regarded as having acquiesced in the judgment (*Murtha* v. *Gates*, and *Foote* v. *Wolhuter*, 1 Buch. App. 268 and 461; and *Zapf* v. *Provident Insurance & Trust Company*, 4 E.D.C., 17). But the privilege to have a judgment set aside is allowed only to the real defendant who was intended to be served, and not to a party who was served in error, or by mistake (*Brink* v. *Wilson & Glynn*, 1 Juta., 278). So also, to make a defendant liable and be bound by his default, it must be proved, or must not be capable of disproof, that his default is regular, that is, that the service of the summons, or other process, was proper, and was not defective (*Collison & Co.* v. *Schmidt*, Buch. Rep. for 1868, p. 33; and *Foote* v. *Wolhuter*, quoted above).

But when the plaintiff's claim is *not* for a debt or a liquidated demand as, for instance, in actions for divorce, or damages, &c., then he cannot get judgment on the summons by reason of the defendant's default of appearance, but must file his declaration and prove his action. In such a case, there must be an endorsement on the declaration, that it is "filed for default of appearance." A copy of the declaration is to be served on the defendant, with a written notice that it is "filed for default of appearance, that he must plead, answer, or except thereto, or make claim in reconvention within .... days (the same time as is necessary in a summons)" (Rules 20, 328, 377, 331). If the defendant should not appear and plead, then the plaintiff may bar him from so doing, and set the case down for trial, for default of appearance and plea of the defendant (Rules 20 and 319). In a trial case, notice of trial should be given to the defendant, though he is in default of appearance and plea (Rules 30 and 374).

When the plaintiff's claim is for a debt, or for a liquidated demand, or for the recovery of land, and the defendant, though he has entered appearance, is in default of plea, and has been barred from pleading, the Court may, without hearing any evidence, and without any notice of trial to the defendant, grant leave to the plaintiff to enter final judgment in terms of the declaration for the amount claimed with costs (Rules 319 and 329), and such cases may be set down for judgment on any Court day (Rule 338). Thus, also, in a case of the cancellation of the sale of land, the Court gave judgment on the Declaration, without hearing evidence (*Barrow* v. *Le Brun*, 5 Juta, 368); and so, also, on a claim for ejectment and arrear rent (*Grundeling* v. *Grundeling*, and *Oudtshoorn Municipality* v. *Edmeades*, 3 Juta, 45 and 306; *L. & S. A. Exploration Company* v. *Williams*, 4 Juta, 254).

If the defendant is in default in a Circuit Court, the plaintiff's judgment has, in the first instance, the force only of any provisional sentence of such Court (Rule 178); but, unless it is reversed or altered at the suit of the defendant (Rule 181), or made final at the suit of the plaintiff, at the next Circuit Court of the same District (Rule 180), then it becomes final at the expiration of a year from the date of the judgment (Rule 179); but a provisional sentence in the Higher Courts, whether the defendant was in

default or opposed it, becomes final at the end of a month after levy made, under a writ of execution (Rule 329).

A defendant sometimes enters appearance to an action with no intention of defending it, but in order either to gain more time, or to facilitate and cheapen the service of any further process in the case; but, with whatever object he enters appearance, he must plead to the plaintiff's claim within eight days after the service thereof, and 24 hours after demand of plea thereafter, unless the Court, or Judge, grants him further time; and in default thereof, he is barred from pleading (Rule 330*b*). He may, however, before judgment, on 48 hours' notice to the plaintiff, and by leave of the Court, or a Judge, who must be satisfied on an affidavit of the facts as to the cause of the default, purge his default, and obtain leave to plead, upon such terms as the Court or Judge may impose (Rules 26, 27 and 147, and *King* v. *Porter Hodgson & Co.*, Buch. for 1879, p. 117). But if he has been debarred from pleading, and the case has been set down for trial by reason of his default, he is not permitted, if the defaults are regular, to defend the action, or in any way to interfere in the trial (Rule 214; *Luck* v. *Owen*, *Stoll* v. *Crous*, 3 Menz., 456 and 549; and *Granville* v. *Randall*, 2 E.D.C., 11). But a defendant who has not yet been, but expects to be, barred by the plaintiff may anticipate him, and apply to the Judge for time to plead, or rejoin, and thereupon the Judge may grant such order as he thinks reasonable (Rule 27).

The meaning of the expression, "*defaults are regular*," is where the plaintiff has observed all the rules and formalities required of him in his process, and that the defendant has been duly served with all the requisite notices and process, and that the required number of days he is entitled to under the summons, or to appear, or plead, or be barred, or to defend, have intervened and been allowed him, and that he has no cause of complaint, on the ground of any omission, or irregularity, or short service. In case any of the defaults is not regular, or there is any other irregularity or impropriety in any proceeding in a case, the defendant need not wait till the case is called for trial in order to start his objections, but he may do so at any time before, by notice of motion to the plaintiff to set aside such proceedings on the ground of irregu-

larity (Rule 28). Like a plaintiff, a defendant cannot appeal from any sentence given against him by default.

CHAPTER XVIII.

Perpetual Silence.

By the 25th and 330th Rules of Court, a plaintiff who has issued summons, but fails to proceed with his action within the time required, can have judgment signed against him; but when a person in any manner gives out or spreads a report, or publicly pretends, he has an action against another, or makes a demand, but does not issue summons, the aggrieved party's only remedy is to sue him for "Perpetual Silence." The difference between the two processes is this, that while in the former the plaintiff can begin his action *de novo*, in the latter the party asserting a claim is perpetually barred from ever bringing an action. The object of an action for perpetual silence is to prevent any alleged claim or demand from remaining in uncertainty, and from a person losing any testimony or evidence he may then have to rebut the allegations of the other party, and which he may lose if the action were indefinitely delayed; also, in case of his death, there may be less chance or proof for his executors or heirs to dispute the other party's claim; and also, that if a person wishes to leave the country, though only on a visit, he is not to be taken by surprise by an arrest for the pretended action.

We have no law in this Colony, as in England, by which proceedings may be taken to perpetuate the testimony of witnesses; though, when an action is once pending, then, when the testimony of a witness is in danger of being lost, he may be examined *de bene esse* (see my Chapter on "Commissions de bene esse"). Our only remedy, therefore, so long as a summons is not yet issued, is to sue for perpetual silence.

The course to be adopted is for the aggrieved party to summon the other to shew cause why he shall not be ordered and condemned to bring his pretended action to trial (state shortly the nature of the action) within six weeks thereafter, or stand for ever barred,

and have perpetual silence imposed on him (Merula 4, 2, 22; Van Alphen Pap., Vol. I, Chap. 5; *Norden, Executor of Horn* v. *Kilian and Stein*, and *Berg* v. *Smuts*, 3 Menzies, 550 and 583: *Campbell* v. *Douglas*, 1 Searle, 48).

The summons may be made returnable on any Court day.

No pleadings are filed in such a case, but on the return day of the summons, counsel moves in terms thereof, supported by an affidavit of facts, a copy of which affidavit should be served on the defendant within a reasonable time before the hearing of the case. The application may, of course, be opposed on the return day of the summons, but it is for the Court to be satisfied that the plaintiff has sufficient grounds to have silence imposed on the defendant.

The Court may also fix any longer period than six weeks within which to bring the action, or to stand barred (*Re West*, 1 Roscoe, 370).

If a plaintiff repeats issuing summons *de novo* after each time judment has been signed against him for not proceeding with the action within the time fixed by the Rules of Court, the Court may construe this into unworthy motives, and on the application of the defendant may order him to bring his action to trial by a certain day, or be for ever silenced.

CHAPTER XIX.

Superannuation.

In the same way as prescription can be pleaded as a bar to certain actions, so can it be pleaded also as a bar to certain sentences of the Court. But the difference between "Prescription to an action," and "Superannuation of a Sentence" is, that the former, when once duly completed, is a perpetual bar to the action, whilst the latter may, at any time within a third of a century, be revived in the same, or in a higher, Court. If not revived within that period, the right to do so becomes prescribed for ever, and the judgment cannot be executed.

In Holland, the sentences of the Town and Village Tribunals become superannuated after the lapse of a year and a day. In the Higher Courts the period was at first five years, and afterwards extended to ten years, while the sentences of the Courts of Amsterdam and Middelburg never became superannuated (G.P.B., Vol. 2, p. 774, Art. 30; Merula 4, 2, 23). As this privilege to Amsterdam and Middelburg was purely local, it does not extend to the Colonies, the other being general, does; and the law of the Colony, therefore, was one year and a day in the Inferior Courts, such as the Magistrate's Courts, and ten years in the Higher Courts. But the Supreme Court, in 1830, in the case of *Meyer* v. *Pohl* (1 Menz., 498), decided that the period for superannuation was only one year; and this decree having been acted upon by the Court for more than a third of a century, became, by custom, the law of the land until it was altered as regards the Higher Courts by the 370th Rule of Court (*Bank of Africa* v. *Kimberley Mining Board*, 2 Buch. App. 6). By this rule, "no judgment becomes superannuated, or shall require to be revived, within six years from its date," and it is also retrospective (*Rabinowitz* v. *Levinberg*, 4 Juta, 358). But this rule applies only to the Supreme, Eastern Districts', High Court of Griqualand, and Circuit Courts (*Government Gazette*, of 24th July, 1885), but not to the Magistrate's Courts, the judgments of which, therefore, still become superannuated after the lapse of a year.

When a sentence has become superannuated, it can be revived only by a summons, not a notice of motion, and the defendant must be called upon in the summons to shew cause why the sentence, giving the date and the amount of the judgment which has become superannuated, shall not be revived and execution decreed. No pleadings are filed in such a case, therefore, on the return day of the summons, which must be in the same form as a summons in a provisional case, and must be made returnable on a Court day; a motion is made in terms thereof, as in a provisional case, and an affidavit may be given in support of the fact that the judgment, has become superannuated; and a copy of the judgment, with a copy of the taxed bill of costs incurred in obtaining the judgment, must be served with the summons (Van Alphen Pap., Vol. I, Chap. 4).

If a judgment against a person, since deceased, becomes superannuated before his executors received letters of administration, it should be revived against such executors (*Buck* v. *Barker*, 1 Menz., 82; Van der Linden, 3, 3, 4, and his Jud. Prac., Vol. 1, Bk. 2, Ch. 10).

The object in requiring a revival of the sentence is to prevent a judgment-debtor being taken by surprise by the plaintiff, having laid by for some time, suddenly enforcing execution. The rule was thus introduced for the benefit of a debtor; who, however, may either directly, or by his conduct, waive it (*Bank of Africa* v. *Kimberley Mining Board*, quoted above). There is no cause that I can think of for which a defendant can successfully oppose the application for a revival of the sentence. He certainly has none of the defences which he might have had to the original action. His time for an appeal, or to have a judgment set aside when he has been in default, has, by that time, lapsed, and he is thus without any ground of defence, and must simply submit to the decree. This being so, the question arises, of what good or benefit is it to a defendant to sue him for a revival of a sentence, when its object (in not being taken by surprise by an execution), can just as well be gained by a letter to him?

The mere issuing of a writ of execution, and then withdrawing or withholding it, does not interrupt the operation of the rule of superannuation; but if the writ be acted upon to its legitimate end, it does, as the rule then becomes inapplicable, and any number of *alias* writs can thereafter, at any intervals or distance of time, be issued without any revival of the sentence, and without any notice to the debtor.

C. H. Van Zyl.

ANTE-NUPTIAL CONTRACT.

GERDS' MARRIAGE SETTLEMENT.

Act 21 of 1875, §§ 3, 4.

What constitutes intent to defraud or delay.

In the Eastern Districts' Court, on the 20th ult., the Hon. Mr. Justice Jones delivered judgment in the above matter (reserved from the Port Elizabeth Circuit Court).

In this action the plaintiff, trustee of the insolvent estate of Frederick William Gerds, sued the defendants: (1) Ada Alice Gerds (born Niven), the wife of the insolvent, (2) Mr. Chase, the trustee of the marriage settlement, and (3) the Standard Bank of South Africa, Limited, in an action to set aside (*a*) a cession under ante-nuptial contract of a policy for £500, together with the accumulations and profits thereon; (*b*) the gift of certain household furniture, linen, &c., mentioned in a schedule attached to the ante-nuptial contract; (*c*) the grant or cession of a certain inheritance which insolvent was entitled to under the will of his late father, Frederick W. Gerds, upon the ground that these transfers, alienations, cessions, and deliveries were made with intent to defraud the creditors of the insolvent in obtaining payment of their just debts, and at a time when his liabilities, fairly calculated, exceeded his assets, fairly valued, and at a time when insolvent owed the firm of Messrs. R. Scholefield & Sons the sum of £3,261 1s. 3d. These claims were made under the provisions of the 3rd and 4th Sections of Act 21 of 1875, the settlement having been made on the 29th November, 1887, and the estate of Gerds sequestrated on the 25th October, 1889. The third defendant (the Bank) was joined because Ada Gerds, with the assistance of her husband, though without the knowledge and consent of the trustee of the marriage settlement, ceded all the benefits conferred on her under this settlement to the Bank. The plaintiff also claimed that a certain transfer of a plot of land in Chase-street, Uitenhage, made by insolvent to his wife during marriage, together with a mortgage thereon to the Standard Bank, might also be set aside upon the ground that it was a mere donation between husband and wife made *stante matrimonio*. This last claim the Bank did not appear to defend against the plaintiff's claim, and the defendant Ada Gerds specially pleaded that she had tendered the plaintiff transfer of this property, and the Standard Bank, through its attorneys, Messrs. Innes & Elliott, had, by letter dated the 22nd March, 1891, abandoned all claim to this particular erf (which was included in a mortgage bond for £2,000 passed by insolvent and his wife to the Bank), and to the proceeds realised by the sale thereof, and had offered to pay any costs which might have been incurred up to that date.

JONES, J., after observing that, as to the last claim, no difficulty would arise, as the gift to Mrs. Gerds must be set aside, went on to say: —By their pleas, the first two defendants deny the indebtedness of Frederick W. Gerds, at the date of the registration of the contract, to Messrs. R. Scholefield & Sons. There can, however, be no doubt that Gerds was indebted to Messrs. R. Scholefield & Sons at this date in a considerable sum of money, if the market value of the produce shipped be considered, though the produce had not then been fully realised. The two first defendants further deny that the settlements were made "with intent to defraud or delay any creditors of F. W. Gerds when his liabilities, fairly calculated, exceeded his assets, fairly valued." The main question, and, in the view I take of this case, almost the only one of any difficulty, is the question whether the settlements under the ante-nuptial contract were made with intent to defraud or delay any creditors. The law, as it stood before Act 21 of 1875, may not in some cases have appeared to be just (*e.g.*, in *Hurley* v. *Palier*, 1 Juta, 154) in its operation, but it afforded a rule much more easily applied than that which has since been introduced. In the cases of *Trustees of the South African Bank* v. *Chiappini* (1 Buch., 1869, 143), *Paterson's Marriage Settlements Trustees* v. *Paterson's Trustee in Insolvency* (Buch. 1869, 112), *Steyn* v. *Steyn's Trustees* (Buch., 1874, 16), the rule laid down in the Placaat of Charles V, 4th October, 1540, had been applied. This rule was that wives who "contract marriage with merchants should not be entitled to pretend to have or receive any dower or any other benefit on the property of their husbands, or to take part or share in the acquisitions made *stante matrimonio* by the husband, even in cases where property had been actually transferred or specially bound for the purpose (*al waar't zoo dat zy ge rift ofte beleend waren*), until such time as all the creditors of the aforesaid husband shall be paid and satisfied, and these creditors were to be preferred before the aforesaid wives or widows, saving to the latter their right of preference, as the same is competent to them by reason of their marriage portion, brought by them into the marriage, and obtained by them, through gift or succession, from their friends or relatives" (see Buch. 1869, 149). This rule has now been repealed by Act 21 of 1875, § 1, and it has been provided by § 2 that no ante-nuptial contract executed after

the taking effect of this Act shall be valid or effectual as against any creditors of either of the spouses, unless duly registered under this Act; and by § 3, that no ante-nuptial contract executed after the taking effect of this Act, whereby one of the intended spouses shall settle upon, or for the benefit of, the other intended spouse, or the children of their marriage . . . any property . . . shall, in case of sequestration within two years . . . be of any force or effect against or in competition with any creditor or creditors upon the insolvent estate of such spouse, whose debt or demands existed at the date of the registration of such contract, *if it shall be proved that the same was made by the insolvent with intent to defraud or delay* his creditors in obtaining payment of their debts. It is further provided by § 4 that when, by the terms of any ante-nuptial contract . . . one of the spouses shall agree for the payment out of his estate . . . of any sum of money or annuity, or for the making of any other provision for the benefit of the other spouse, or for any of the purposes in § 3 specified, no payment, transfer, alienation, cession, delivery, mortgage, pledge, or other act in order to carry out such agreement, shall, in case of the subsequent sequestration of the estate of the covenanting spouse, be of any force or effect against, or in competition with, creditors . . . whose debts existed at the date of such payment, etc., if it be *proved* that such payment, etc., *was made with intent to defraud or delay* any such creditor . . . of such spouse in obtaining payment of his . . . debts, and at a time when his liabilities, fairly calculated, exceeded his assets, fairly valued, but no payment, etc., is liable to be impeached or invalidated after five years from the making thereof. In the one case the settlement impeached must be proved to have been made by the insolvent *with intent to defraud* or delay his creditors, and in the other it must be shown that the payment transferred was made with intent *to defeat or delay any creditor or creditors.* And the onus of proving the intention in either case necessarily lies upon the creditors or trustees who challenge the transaction. The same difficulty arises here, that is found to exist under the Insolvent Ordinance, when a trustee attempts to prove an intention to prefer on the part of the insolvent. The law as it now stands makes it necessary to prove the intent of the person making the settlement, payment etc. It

may be doubtful whether the Legislature has not gone too far, and whether it would not have been better simply to have provided that the settlement should be void if the debts of the spouse making the settlement, fairly calculated, exceeded his assets, fairly valued, but this is not the question for the consideration of the Court, and is one which can be dealt with by the Legislature only. This Court can only apply the law as it stands. The Legislature has specially made the non-validity of the settlement depend upon the intent with which it is made, and the cancellation of the payment, transfer, &c., under the settlement depend upon the interest and the condition of the assets and liabilities. In order, however, to arrive at the intention of the person making the settlement or payment, all the surrounding circumstances existing at the time the act was done must be considered. The mere statement of the insolvent would not necessarily bind the Court, unless he could show that in the existing state of facts the intention he asserts was possible and probable. On the other hand, when the circumstances of the insolvent leave the fact of the intention merely a matter of suspicion and doubt, it cannot be said that there has been such proof as the law requires in order to set aside a settlement made upon the consideration of marriage.

After reviewing the facts at length, his lordship noticed that the figures put in showed that Gerds' ledger balances on the 29th November, 1887 (the date of the settlement), showed a surplus of £4,972 13s. 11d., not including the value of the property ceded under the ante-nuptial contract; but that it had been submitted that deductions for depreciation in value of produce, and a debt from one Smerdon of £660 2s. 10d., which together amounted to £5,564 16s. 2d., should have been allowed for, which would make a deficit of £592 2s. 3d. His lordship, however, observed that if Smerdon's debt had been good, Gerds, on these figures, would not have been insolvent, and there was nothing to prove that Gerds had good reason for thinking this debt bad at the time of the settlement, though Smerdon, two years later, was hopelessly insolvent. After dealing with the other suggested allowances for loss in detail, his lordship said:—"What the Court has to consider is whether all these losses could at that time be fairly said to have been anticipated by the insolvent. If the Court cannot come to

the conclusion that they were, it would be wrong to attribute to the insolvent either an intention to defraud or to delay creditors. It is said that it may be questionable whether there should not be a further allowance made on the Port Elizabeth wool of £797 15s. 4d., on gold shares of £2,092, and of £1,000 upon the Uitenhage residence; but there is no evidence to show that these allowances would have been deemed necessary by Gerds in November, 1887. On the whole, therefore, the plaintiff has failed in proving the allegations necessary to enable him to set aside the settlement or the cession of the policy to Mrs. Gerds, the grant of the furniture, or the cession of the inheritance.

Per curiam: Order accordingly; the Court, however, intimating that the judgment did not touch the question of inheritance which might revert after the order for sequestration.

The remarks which were made by Mr. Justice JONES in the course of the above judgment are worthy the attention of the Legislature. They point out what is likely always to prove an awkward flaw in the provisions of Act 21 of 1875, with reference to ante-nuptial contracts, which may be challenged on the ground of their being such as to defeat, defraud or delay creditors. The difficulty which has been felt in legislating for such cases arises from the fact that marriage has always been recognised as a valid consideration; or, to put it in the more usual form under Roman-Dutch Law, there is a *quid pro quo* in a contract where a settlement is made in view of a marriage. This position is so old a tradition among lawyers that it may seem impossible to disturb it; but still there has long been an uncomfortable suspicion in the minds of practical men that, as a plain matter of fact, a large number of marriage settlements differ very little from voluntary deeds of gift; and that they ought to be in many cases subject to be set aside as if they were such. Out of the consideration, however, of the undesirability of disturbing family arrangements, there has been, both in England and in this Colony, an unwillingness fully to adopt this view. By the English Bankruptcy Act of 1883, settlements in consideration of marriage are excepted from the salutary rule which brings voluntary settlements into the estate of an insolvent if the insolvency take place within two

years. Our own law attempts to go a step further than this, but does not very much mend matters. It provides (21 of 1875, § 3) that no ante-nuptial contract executed within two years of the sequestration of the estate of the spouse making the settlement shall be valid against the creditors "if it shall be proved that the same was made by the insolvent with intent to defraud or delay his creditors in obtaining payment of their debts." As Mr. Justice JONES pointed out, the duty of finding the intent is thus thrown upon the Court, and this is ordinarily no easy task. The effect of the 3rd Section of the Act is, indeed, in some cases, to afford a protection to the person making the settlement which he would not have at common law, and which it may fairly be believed was not intended by the framers of the Act. The declaration that the settlement "was made by the insolvent with *intent*," &c., makes it necessary to prove actual intention, that is to say, the acts of the insolvent and the circumstances must be shown to be such as can leave no doubt on the mind of an impartial person that he knew he was insolvent at the time he executed the contract, and that he designed to save what he could out of the coming wreck by means of the ante-nuptial settlement. It is needless to point out that it will generally require a very strong case to bring intent home to the insolvent to this exten'. The risks of commerce, which is year by year becoming more speculative, are such, that it is hard to deprive any person, especially one in the happy position of an intending spouse, of the consolations of hope, which "springs eternal in the human"—but perhaps more particularly in the mercantile—"breast." Nothing short of such a state of affairs as must have culminated in a bankruptcy at the time the ante-nuptial contract was made would, in a general way, be sufficient to prove express intent—and §§ 3 and 4 of the Act do away with the possibility, which in some cases might exist, of proving implied intention from the whole circumstances, in the same manner as may be done in respect to an ordinary case of fraudulent preference. It is true that § 11 declares that "nothing in this Act contained shall extend to protect or make effectual any ante-nuptial contract which would, by reason of some fraud thereby perpetrated or attempted, have been void or voidable by law in case this Act had not been passed." It is, however, to be feared

that the Act will, § 11 notwithstanding, have this effect, as it is impossible in a case where fraud, or something like it, is set up, to ignore the full force of the Sections which prescribe the degree of proof as regards intent, which the law, as modified by the Statute, requires. If the Legislature intended to declare that ante-nuptial contracts which are made less than two years before an insolvency, should be regarded and treated as if they were voluntary settlements—which would probably be reasonable enough—they have certainly missed the mark. The truth is that legislation is required upon a more rational basis than the time-honoured principle of deeming marriage to be a consideration in all and every case. In the large majority of instances, it undoubtedly is so. Ordinarily, people do not marry when they know their affairs are involved. But if an insolvency is found to take place within a short time like two years after the marriage, common sense suggests that the presumption of the settlement having been made merely in consideration of the intended marriage is neutralised, if indeed a preponderating presumption is not raised that such settlement was made with the knowledge that in all probability insolvency would arise, and that in such case the settlement would have the effect of saving the property. It is only in cases where, from a man having been in difficult circumstances, it is, on the surface, doubtful whether a marriage settlement has been *bona fide* made only in consideration of marriage, that an ante-nuptial contract is ever likely to be impeached, and it is, in connection with such a case, clearly inconsistent to assume such *bona fide* consideration; in other words, to assume the very fact, the *prima facie* doubtfulness of which has been the cause of the settlement being called into question.

RIGOURS OF IMPRISONMENT.

Our attention was some time ago called by a correspondent to certain Regulations framed under the provisions of the "Convict Stations and Prisons Management Act, 1888." It was suggested by a correspondent that the Regulations were somewhat harsh. But, it must be borne in mind that these Regulations are intended

to check insubordination and attempts to escape from convict stations and prisons. For instance, convicts sentenced, runs the first new Regulation (52) under Regulation 47, to solitary confinement shall be subject to the following rules:—

(*a*) If confined for a period of 7 days or less, they shall not be allowed to leave their cells except by special permission.

(*b*) If confined for any period exceeding 7 days, they shall be made to take exercise: For half-an-hour every other day if confined for 8 to 21 days inclusive; for half-an-hour every day if confined for 22 to 42 days inclusive; for half-an-hour twice a day if confined for 43 to 84 days inclusive.

(*c*) Whilst taking exercise they are forbidden to speak or make signs to any other convict, or to any officer, or to hold any communication whatever without special permission.

(*d*) The exercise shall be such as may from time to time be prescribed by the Attorney-General.

It is to be presumed that these rules were not prescribed without medical advice as to their propriety, from a medical point of view. That they are extremely severe rules cannot be doubted. But then they are directed to check the desperate efforts against prison control of most desperate characters. It is to be hoped that a sentence of solitary confinement for *eighty-four days* is a sentence very rarely called for even by the misconduct of the worst of convicts. The amount of exercise permitted is apparently the *minimum* without actual injury to health. Solitary confinement for forty-two days, forbidden to speak or make signs to any other convict, or to any officer, or to hold any communication whatever, without special permission, whilst taking the one half-hour's exercise allowed *per diem*, seems very rigorous indeed. Yet it is difficult to condemn very rigorous punishment for breaches of discipline in convict stations and prisons. Without desiring undue severity in the treatment of convicts, we are inclined to think that a little more stern discipline in all cases would not make prison life so easy a matter as it seems to be now. Judges are constantly referring to the degradation which Europeans suffer in being sent to "herd" with Natives in convict stations, &c., and they generally pass a fairly light sentence upon the European convict, allowing the presumption of lacerated feelings to weigh in his favour. Some

Judges express the opinion that Europeans and Natives should not be sent to one and the same convict station. In these days of increased facilities of communication, we are disposed to share this opinion, and we would urge that some prison or convict station be set apart expressly for the confinement of European convicts. The proportion of European convicts to European population is very high. It would be interesting to be informed of the precise figure. But it is high, and many of these convictions are for thefts of stock, often on a large scale. In fact, some farmers hold the opinion that low-class Europeans have a good deal to do with stock thefts on a large scale. Considering the facilities for crime which favour its commission by Europeans, it seems only reasonable that those who do fall should be very sharply reminded of the gravity of their offence. And not only should debased Europeans be sentenced to a longer term of imprisonment than semi-civilised "Natives," or half-starved farm servants, but their treatment, while in durance vile, should be at least in proportion to the height from which they have fallen, a level upon which Europeans are credited almost with an incapacity for crime, and certainly as rigorous as the treatment they would experience in a gaol in Europe. As things are, not only are Judges constrained to pass lighter sentences than otherwise would be the case, but the Europeans in a convict establishment, certainly in a gaol, constitute an upper class of convicts, which surely it is undesirable to perpetuate. There is another consideration in favour of more severe sentences upon European convicts. Upon his release from imprisonment the world is before the ex-convict to an extent which would not be credited in Europe. Without saying that he resumes his position in society, although there are not wanting instances of such being the case, it may be said that the released convict has little or no difficulty in making a fresh start. Nor would any reasonable person wish it to be otherwise. The spirit of oppression, which would crush down for the term of his natural life, every unfortunate who has once lapsed from the path of rectitude, is cruel and to be condemned. But still the fact that facilities for a fresh start are present in the case of ex-convicts of whatever nationality, should weigh in the apportionment of sentences, and in the character of the prison discipline. There is a very popular clamour aboard for increased

punishment for thieves, of "stock" thieves in particular. More stringent prison discipline, and a general increase in the length of sentences of imprisonment, would go far to diminish thieving, whether it be from farmers or any other class of society. But the separation of white from black convicts should be effected, and in the case of each class an increase in severity of treatment in prisons would tend to reduce crime. To Europeans, detention in prison and convict stations is irksome in the extreme, but very often it is not really punishment, while to Natives of the class who fill our prisons, there can be little doubt that to be well housed, fed and adequately clothed, is a mild form of punishment, of which they can bear a considerable amount.

CONTEMPT OF COURT.

We have received the full text of an elaborate judgment delivered in the High Court of the Transvaal, by Chief Justice KOTZE, in the case of *Dormer*, who was proceeded against in a summary proceeding for Contempt of Court. The alleged contempt consisted of a newspaper article entitled "Drifting," which appeared in the *Star*, on February 18th last. The article, as gathered from the judgment, set forth that the Judges of the Transvaal Bench were not without fear nor above reproach; that rumours were abroad having the effect of discrediting the whole Bench; that the Judges were the creatures and hirelings of the Executive; that judgments of the Court could be, and had been, set aside by the Executive; that the Judges had submitted in this to the will of their masters, the Executive Council, and that should the Judges be so ill-advised as to raise a protest they would forfeit their seats on the Bench, &c., &c.

There was some difference of opinion amongst the Judges themselves on one important point. MORICE, J., considered that the article did not amount to a contempt of Court, because the object in view was to bring about, rightly or wrongly, a reform in the Constitution, and the article did not reflect upon the Judges in the execution of their duties, nor upon their conduct as Judges, while it did not allege corruption or

dishonesty in the Judges. DE KORTE, J., appears to have considered the publication did not amount to contempt, because (1) it was not committed *in facie curiæ*; (2) it was not a comment on a pending case; (3) it was not any disobedience of an order of Court; (4) it did not ascribe any corrupt or dishonest motives to the Judges in the discharge of their duties. On the other hand AMESHOFF and JORISSEN, J.J., agreed with the CHIEF JUSTICE.

The defendant, in the result, was fined £500. We have not space for the whole of the very exhaustive judgment of the CHIEF JUSTICE, but his lordship's dissertation upon one point, viz., whether by Roman-Dutch law Contempt of Court, not committed *in facie curiæ*, could be summarily punished, will probably be welcomed by our readers. In delivering his judgment, the CHIEF JUSTICE detailed the local law governing Contempt of Court, beginning with the Thirty-Three Articles of 1844. He referred also to the consecutive decisions of Superior Courts in South Africa generally as to usage and practice (*Neethling's Case, Cape Argus*, December 9, 1874, Buch. Reps., 1874; *In re Blanche*, 1 Laurence; *in re Phelan*, Kotzé Reps., p. 5, &c.), and observed that it would be a very strange anomaly if the highest Court of civil and criminal justice in the Republic did not possess summary jurisdiction to punish acts whereby the authority of the Court and its administration of justice were brought into contempt. His lordship proceeded:—

"But, then, it has been repeatedly asserted by Mr. Leonard, who appeared to show cause against the rule, that by Roman-Dutch Law this Court has no jurisdiction whatever to proceed summarily for an alleged contempt, if it be not committed *in facie curiæ*. During the argument I drew attention to the fact that a similar contention had been taken in *McDermott's* case (L.R. 2 P.C., p. 341), but that the Privy Council had, however, not deemed it necessary to consider that objection, inasmuch as it held that, apart from the principles and provisions of the Roman-Dutch law, the Supreme Court of British Guiana had, under the act and instrument whereby it was created, summary power and jurisdiction to punish for contempt, and such was also one of the grounds upon which I proceeded when delivering judgment, for I stated that, by the local law and the constitution of the Court, we had authority to

act summarily in cases of contempt. Now, so far as the Roman-Dutch law is concerned, Mr. Leonard maintained that, as a Judge cannot adjudicate in his own case, he is precluded from hearing and deciding upon a matter in which anyone is charged with having libelled the Judge in a manner amounting to contempt, the only remedy being for the Judge to proceed as for an *injuria* committed against him personally. The same line of argument had already been taken by the present Chief Justice of England, when at the Bar, in *McDermott's* case. I deem it advisable to quote a portion of that argument, not because of any value or weight that should be attached to it, for the argument is altogether founded on a fallacy, and a misconceptian of the true principle of Roman-Dutch law and of the authorities bearing thereon. My sole object, in referring to Lord COLERIDGE's argument, is to rectify what appears to me an error of which he is guilty, upon an important point of Roman-Dutch jurisprudence—an error into which Mr. Leonard, who has followed him, has likewise fallen, when he asserted that an offence whereby the administration of justice is brought into contempt, committed outside the precincts of the Court, could not be proceeded against summarily, and added that he and Advocates Esselen and Sauer, who were with him in the case, had searched high and low, but could discover no Roman-Dutch authority whatsoever in support of the Court's jurisdiction in the present matter. Unfortunately, experience teaches that counsel, in their zeal for their clients, are sometimes led to make assertions and statements which will not stand the test of inquiry. On reference to the report of *McDermott's* case (L.R., 1 P.C., pp. 261, 264) it appears that the particular contempt consisted in publishing in the *Colonist* newspaper "certain articles respectively containing divers matters scandalously reflecting upon the Court, and in particular upon Mr. Justice CROSBY, one of the Judges of the Court, and improperly reflecting upon Edward Charles Ross, the informant of the Court therein, and tending to defame and obstruct the administration of justice;" and we find Lord COLERIDGE, as counsel for McDermott, delivering himself as follows: "The result must be that the authority, if possessed by the Supreme Civil Court, to commit for a contempt such as alleged in this case, must be by virtue of, and under, the Roman-Dutch law, or, in the

absence of that law, under the authority of the Roman civil law. Now, as regards the Roman-Dutch law, I assert, *without fear of contradiction*, that no such power as has been here exercised, exists by the Roman-Dutch law. That law was imported into the Colony from the States of Holland, and is, in effect, the law now prevailing and administered in the civil Courts in that Colony. Considerable care has been taken to ascertain with correctness what the law and practice on this point prevailing in the United Netherlands is, and the opinion of J. Kappeyne van de Coppelo and M. S. Pols, two of the most eminent of the advocates of the High Court of the Netherlands, has been taken on this very question, both of whom give their unqualified opinion that no such power exists in, or could be exercised by, either the High Court of Holland, or any other Court or Judge where the Roman-Dutch law prevails, and they state the ground and authorities on which they base their opinion. . . . . The authorities relied on for the opinion thus given are Petrus Bort, Tract de Criminal, Lib. 1, No. 54; J. Voet, Com. ad Pandectas, Lib. 5, Tit. 1, § 2; Carpzovius praxis communis; Farinacius variarum quæstionumet com. opin. crim., B. 1, Tit. 1, Quæst. 1, §§ 56, 57. In Van Leeuwen, Cens. For., par. 2, Lib. 2, Cap. 14, No. 6, and it may be added that in Van Leeuwen's Commentaries on the Roman-Dutch Law, Bk. v., Chps. 6 to 11, on the jurisdiction of Judges, no such authority as that contended for here will be found, nor in Van der Linden's Institutes of the Laws of Holland, a work of the highest authority. But a mode of proceeding in civil cases called "Gyzeling," or civil confinement, which is now superseded, is there described in Bk. 3, Pt. 1, Chap. 9, § 19, p. 495, which clearly shows that the Dutch Courts possessed no power of summary conviction, and that a party, whether Judge or not, must proceed in such a case as this as for a crime against reputation, and seek for compensation and reparation by a claim, which is termed *amende honorable et profitable.*" The learned counsel then urged that instead of adopting this course, the Judges of British Guiana had usurped an assumed summary jurisdiction, and he proceeded as follows: "This is further illustrated by Grotius, Bk. 3, Ch. 32, § 17; Ch. 36, § 3; Pand., Lib. 5, Tit. 1, de Judiciis, Lib. 2, § 8; Domat, Vol. 2, p. 8, by which it appears that in

order to exercise any such equivalent authority, as has been here assumed, the civil law requires some overt act." I must say it is with no little surprise that I have read this portion of Lord COLERIDGE'S argument. The contention that, because the text writers lay down the elementary principle that a Judge who sustains an *injuria*, either literal or verbal, must seek compensation in the ordinary way by action, therefore no Judge or Court has summary jurisdiction to punish for contempt, is a complete *non sequitur*. In like manner, the assertion that, inasmuch as the chapters in Van Leeuwen, dealing with the jurisdiction of Judges, make no mention whatever of a summary jurisdiction in cases of contempt like the present, the Superior Courts of justice do not possess such a jurisdiction, is not of much weight, for it may with equal justice be said that for the same reason the Courts have no jurisdiction in cases of contempt committed *in facie curiæ*, or that, because a particular writer on the criminal law of England or the Cape Colony is silent as to contempt, that therefore the Courts of justice in England or the Colony have no power to deal summarily with such cases. And it must be quite clear to everyone acquainted with Roman-Dutch jurisprudence, that the particular proceedings of Gyzeling, or civil confinement, is wholly beside the present inquiry. Unfortunately, we have not a copy of the precise case submitted to the two counsel mentioned by Lord COLERIDGE, nor have we a copy of their opinion and of the reasons on which it is based; but still, I think, we may fairly conclude from the report in *McDermott's* case that the opinion given amounts to this: "that a Judge, or Court, has no summary jurisdiction to punish any offence whereby such Judge or Court is attacked and libelled in a way tending to obstruct and defame the administration of justice, but the Judge or Judges must proceed in the ordinary way, by action for compensation as for an *injuria*, and this (judging from the authorities cited) presumably for the reason that the matter concerns the Judge or Judges personally, and *in re propria iniquum admodum est, alicui licentiam tribuere sententiæ* (Cod. 3, 5.) Now, with all deference, this is taking an entirely incorrect view of the matter. There is a clear distinction, as my brother JORISSEN and I suggested during the argument of Mr. Leonard, between the case of a Judge suing personally by

means of an ordinary action for an injury done him, and his taking summary proceedings for an offence committed against him in his office and capacity as Judge. In the one case he has a direct personal interest, and seeks a purely personal benefit; in the other, he acts in his public capacity to vindicate his authority as Judge, and to uphold the dignity of his office, and the respect which is due to the administration of justice, which is a matter of public concern. It is quite true, and indeed very right and proper, that no one should be Judge in his own case, but, under the circumstances supposed, the summary proceedings instituted for an alleged contempt are not taken by the Judge *in propria causa*, for, both upon principle and authority, the case is *aliena causa*. This distinction is clear and intelligible. It exists and is recognised, both in South Africa and other countries, for, although the maxim *nemo in sua causa judicare debet* is there observed in all its purity and strictness, still the superior Courts of Justice possess, and have exercised, summary jurisdiction for contempt, and it has also been held, as the decided cases show, that the particular Court concerned, and it alone, is the proper tribunal to take proceedings and to punish in such cases. The distinction in question was also well known to, and approved by, the commentators and writers on Roman-Dutch law. The first authority to whom I will refer is Gail, Lib. 1, Obs. 39. As is generally admitted, this commentator, who has been described as the Papinian of Germany, is a very high authority, and his *observationes* are almost invariably cited by the Roman-Dutch jurists with approval. Now Gail gives a case, which actually occurred in practice, and which is quite in point. Some one had written and addressed a letter full of abuse to the Court (*ad senatum*), for which he was imprisoned by that Court. The question arose whether the Court possessed this power? and Gail thus proceeds to deal with it. He says, it would seem at first sight that the Court did not possess such power, inasmuch as no one ought to adjudicate in his own case, but the contrary was decided, and it was held that the Court could summarily, without more (*incontinenti*), punish such an injury, regard being had to the dignity of the persons and the gravity of the offence. For, as often as an offence (*injuria*) is committed against a judge, "as such" (*ut judici*), and this offence is evident and apparent

(*notoria*), as in the present case, by abusive letters clearly admitted by the author in Court by which he had defamed the Court, as Judges (*quibus Senatum ut judices diffamarat*), the Judge, in punishing, is said to proceed and to condemn, not in his own matter, but in that of another (*non in suo sed alieno negotio*). But it is otherwise if the penalty be imposed for private benefit; as where the Judge, having suffered a wrong, should seek to apply a private punishment, for instance, to inflict a penalty for his own advantage, for in such a case he may not be a Judge in his own suit. This latter principle, Gail adds, should also be adopted if the offence (*injuria*) be not clear and manifest, but requires further proof to establish it. He also lays it down that the punishment in such summary cases is extraordinary and discretionary with the Court, and he then refers to Angelus, who gives a sort of form of sentence in such instances where the Judge is supposed to pronounce judgment and to condemn the offender to a fine for the offence committed in contempt of his jurisdiction (*in contemptu meæ jurisdictionis*). This authority, then, at once settles several important points, which may be expressed in the form of the following proposition: "That a Judge or Court possesses the jurisdiction to proceed summarily and to punish at discretion any offence (*injuria*) committed against the Judge or Court, as such, which amounts to a contempt of the dignity or office of the Judge, or of the administration of justice, and this whether such offence be committed in the presence of the Court or thereout." I have carefully looked into the authorities cited in the argument in *McDermott's* case, and also by Mr. Leonard, with the exception of *Farinacius Variar, quæst,* a copy of which I have been unable to procure, and I nowhere find anything which can fairly be construed as justifying the statement that the Court has no summary jurisdiction in a case like the present to punish for contempt. I will deal with these authorities *seriatim,* and first of all refer to Van Leeuwen, who says that *injuria verbalis* or *literalis,* especially if it be *atrocior,* as where it is committed against a Judge or Magistrate, as such (*officii sui ratione*), is punishable criminally by means of imprisonment or other punishment at discretion (Cens. For., 5, 25, 8). But then, Van Leeuwen also says (Cens. For., Pt. 2, Lib. 2, Cap. 14, § 6), that no one should, in his own case, act as Judge,

whether civil or criminal, and, he adds, a different practice prevails in Saxony in certain cases established under special constitutions, and that Carpzovius thinks this practice can be defended in criminal cases on the ground that, if the case be clear (*si factum sit evidens et notorium*), the Judge acts rather as the instrument in applying the punishment than as deciding upon the guilt or innocence of the accused (*tunc magis executor quam judex habeatur*). This distinction Van Leeuwen, however, deems, and in my opinion rightly so, to be neither in accordance with law nor reason, for it would certainly be as improper for a Judge to sit where he has to enquire into the guilt of a person accused of stealing his property, as it would be if he adjudicated in a matter in which he sued for damages by reason of some wrong or injury done to him personally. It must be carefully borne in mind that Van Leeuwen, in the above passage, is treating merely of the general rule that no one can adjudicate in his own matter *(in causa sua aut propria)*, and does not discuss the question at all of the competency of the Judge to decide upon, and punish, a case of insult or other offence *(injuria)* committed against him in his judical capacity, whereby the administration of justice is brought into contempt, and consequently this paragraph from the Censura cannot be cited as an authority to establish the position, that unless the offence be committed *in facie curiæ* the Court or Judge against whom it has been perpetrated has no jurisdiction whatever in the matter, for, as Gail puts it, in such case the proceeding is not *sua aut propria sed aliena.* Another authority that has been cited is Bort Tract de Criminal, tit. 1, n. 54, where the learned jurisconsult, after stating the principle laid down in the Code (3, 5) that no one can adjudicate his own case, proceeds to say that it is everywhere observed that a Judge can punish by fine or other more severe penalty a manifest wrong or injury done him while acting in his office, provided the offence have reference to the office and dignity, and not the person of the Judge, as usually happens when it is committed against the Judge sitting on the bench. Now, it does not follow that this statement is an authority against the jurisdiction of the Court, where the alleged contempt is not committed *in facie curiae*, for Bort distinctly gives it as his opinion that the Judge can punish an evident case of contempt, if it be committed against him acting in his capacity or office. He

does not limit it to acts committed *in facie curiæ* as the words "as usually happens when it is committed against the Judge sitting on the bench" prove, for they are merely illustrative of the proposition, and do not necessarily include all the cases of contempt which the proposition may embrace; and it does not need any argument to show that the dignity and office of the Judge, or the administration of justice, can be as effectually attacked out of court as *in facie curiæ*, and if anything, the former is the graver offence of the two, for it generally presupposes a certain amount of premeditation. If a Judge is not acting in his own case when he punishes contempt committed *in facie curiæ*, he is equally not acting in his own case when he punishes a clear instance *(factum notorium)* of contempt committed out of Court. How can it be maintained on principle that the contempt, not having taken place *in facie curiæ*, the Court cannot exercise summary jurisdiction, but the case must proceed before a jury in the ordinary criminal form? Shall the dignity and authority of this Supreme Court, so necessary for the proper discharge of its functions and duties—a portion, in fact, of the sovereignity entrusted to its keeping by the sovereign people—be left to the discretion of the Attorney-General, for that officer to decide whether there shall be a prosecution? and shall the Judges, as such, descend into the arena of their own tribunal as parties or witnesses, and the final result rest with the finding of the jury? Sound reason and law certainly do not countenance such a view. The jurisdiction of the Court carries with it the necessary power to maintain that jurisdiction and the respect due to it, wherever, whenever, and howsoever it may be attacked. And here let me quote the somewhat quaint, yet withal most eloquent and apposite remarks of WILMOT, C.J., in *Almon's* case, where a pamphlet had been published attacking Lord MANSFIELD in respect of a judicial act done by him at his private house: "Whenever man's allegiance to the laws is fundamentally shaken, it is the most fatal and dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the Judges as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial, and to be universally

thought so, are both absolutely necessary for giving justice that free, open, and uninterrupted channel which it has for many ages found all over this kingdom, and which so eminently distinguishes and exalts it above all nations on the earth. In the moral estimation of the functions, and in every public consequence arising from it, what an infinite disproportion is there between speaking contumelious words of the rules of the Court, for which attachments are granted constantly, and coolly and deliberately printing the most virulent and malignant scandal which fancy could suggest, on the Judges themselves. It seems to me material to fix the ideas of the words 'authority and contempt of the Court,' to speak with precision on the question. The trial by jury is one part of that system. The punishing contempt of the Court by attachment is another. We must not confound the mode of proceeding, and try contempt by jury and murders by attachments; we must give the energy to each which the constitution prescribes. In many cases we may not see the correspondence and dependence which one part of the system has and bears to another, but we must pay that deference to the wisdom of many ages as to presume it, and I am sure it wants no great intuition to see that trials by jury will be buried in the same grave with the authority of the Courts which are to preside over them" (Wilmot's 'Opinions and Judgment,' p. 255). We next come to Carpzovius on Crimes. In the edition of Hogendorp (Vol. 2, Chap. 88, §§ 52-55) we have Carpzovius following with approval the observation from Gail which I have already mentioned, and he sums the matter up as follows: "Consequently, in order that the Judge may at once summarily, and without observing the ordinary legal procedure, punish the offender, three things, according to the opinion of the aforesaid jurist (*i.e.* Gail), are necessary: 1st, that the offence be committed against the Judge, as such; 2nd, that the offence be manifest and clear, and does not need further evidence to prove it; 3rd, that the offender be condemned to discretionary punishment, and not to a withdrawal and compensation of the wrong. If one or other of these be wanting, the Judge will have no jurisdiction, but recourse must be had to a higher Judge, in order that the latter, as competent Judge, may take cognisance of the matter. Now, Carpzovius, instead of being against the

exercise of summary jurisdiction by the Court in a case like the present, is, even as Gail, clearly in favour of it. In the same way, Voet, after reminding the reader (5, 1, § 1), that no one can take the law into his own hands, or act as Judge in his own case, proceeds in § 2 to enumerate certain exceptions to this rule, and observes that it is not unjust for a Judge to punish by fine such as do not scruple to inflict an injury, whether by word or deed, upon him as Judge (*qua judici*), or upon his officers, provided the penalty be publicly imposed, and not for the benefit of the Judge. Voet likewise cites Gail and Carpzovius in support of this view. Van der Linden, in his *supplementum* to this passage in Voet, remarks that is clear and well settled that a Judge can exercise jurisdiction and punish offences committed against him by reason of his office, and that such was already allowed by the Roman law: "*Certi et expediti juris est, posse judicem injurias sibi ratione officii illatas ipsum vindicare debitisque poenis afficere, id quod jam jure Romano licuisse ex Dig.*, 2, 3, *colligitur, ubi omnibus magistratibus secundum jus potestatis suae conceditur, jurisdictionem suam defendere pœnali judicio.*" Taking the opinion of Voet, coupled with the fact that he quotes Gail and Carpzovius in support of his text, I fail to see how he can be applied as an authority against the exercise of jurisdiction by the Court against the printers and publishers of an article in a newspaper, whereby the dignity of the Court and the administration of justice are calculated to be brought into contempt. On the contrary, as I understand Voet and Van der Linden, they favour the principle that the Judge or Court should be clothed with authority to maintain and defend the dignity of the judicial office and the administration of justice, and they nowhere draw any distinction between the mode or manner, the time or place, in which the attack is made. The test or principle always is, and remains: Has the Judge, in the dignity and exercise of his office, or has the administration of justice, been brought into contempt? Besides the authors to whom I have already referred, I should like to mention two other Roman-Dutch writers upon the point under consideration. In Wassenaar (Jud. Pract., Vol. 1, Ch. 19, § 16) I find the following passage: "The *actio injuriæ* also lies at the suit of a party against a town, village, or other body by whose direction such party has been injured; likewise against a Magistrate or

judge, who is guilty of anything tending to injure or defame another; even as, on the other hand, a Judge may himself summarily punish offences which are clearly committed against him as Judge." Like Carpzovius and Voet, Wassenaar also cities Gail 1, Obs. 39, in support of this statement. So Kersteman tells us that the action for *injuria* arises in one of three ways, either by reason of acts, words, or writings; and he proceeds to say that "a Judge who has thus been injured in his office may decide upon the injury so done him, if the injury be clearly apparent (*si injuria sit notoria*), which is especially the case where the whole Court is injured or defamed (as in the present instance). . . . All verbal injuries against respectable bodies, or colleges, nobles, and other privileged persons of eminent birth and degree, upon the maintenance of whose honour and good name the commonwealth depends, is not satisfied with an *amende honorable et profitable*, but is punished far more severely, and even corporally, or with banishment. And upon this ground, a confectioner at the Hague was imprisoned for verbal injury against a Judge and Assistant Registrar of the Court, but subsequently, in the year 1622, the States granted him a pardon, without further confirmation. Nevertheless, he was condemned in the costs and Court expenses" (Regts. Woordenboek, *sub voce injurie*). I think it will be admitted that the authorities satisfactorily dispose of the proposition, so boldly made, without fear of contradiction, by Lord COLERIDGE in *McDermott's* case, and by Mr. Leonard in the present instance; and I am quite satisfied that the exercise of summary jurisdiction by this Court, under the circumstances of the present case, is in accordance both with our local law and practice, and with the principles of Roman-Dutch law.

BARBED WIRE FENCES.

The increasing prevalence of the use of barbed wire in this country will probably come before one or other of the Courts in due course. The *Law Times* of March 28th last gives a judgment delivered by His Honour Judge EDGE, at the Crediton County Court (Devonshire), in an action for damages alleged by the Plain-

tiff to have been sustained by him in consequence of a mare, his property, being injured by barbed wire placed by the defendant on his own land, but in such a position as to be dangerous to cattle in the plaintiff's field. The judgment was as follows:—

This is an action to recover damages for an injury sustained by the plaintiff's mare, alleged to have been caused by the defendant placing a barbed wire fence on a portion of his land which adjoined the plaintiff's field. I find the facts to be as follows: The plaintiff is the tenant of a farm at Morchard Bishop, and the defendant is the rector of the parish, and, as such, occupies the glebe land which adjoins the plaintiff's farm. Between a field, a part of the glebe, and a field of the plaintiff's called Wood Park, there is an ordinary fence, consisting of a ditch and a bank, and upon the latter a hedge of underwood. The ditch and bank are upon the defendant's land, and it was admitted by the defendant at the hearing, that the fence had always been maintained and repaired by himself, and his predecessors in the living. Neither the plaintiff, nor his father or grandfather, who had occupied the farm for a great number of years, had ever repaired the fence, which, I have no doubt, had been maintained by the owners of the glebe for the mutual benefit of the occupiers of both farms. For some time previous to the occurrences forming the subject of this action, horses placed in defendant's field occasionally forced their way through the fence and got into plaintiff's field, and it is alleged that animals from the plaintiff's field had in like manner got into defendant's land. However that may be, a gap had been made between the two fields, and on the 13th August last, two horses from the defendant's land got through the gap and were found trespassing in the plaintiff's field. They were at once turned out by the plaintiff, or his men, and a message was sent to the defendant informing him of what had occurred, and requesting him to make up the gap. The defendant was not at home, but the message was received and acted upon by his hind, for whom the defendant accepts responsibility. The next day the hind proceeded to make up the gap by placing wooden rails on the side next the glebe land, and field stakes, with three lines of barbed wire, on the side next the plaintiff's field. The lowest wire was fixed about fourteen inches from the ground below it, but this

ground was higher than the natural level of the plaintiff's field, owing to the bank having fallen down and filled up the ditch and made a small mound above it. The plaintiff's mare was placed in his field on August 15th, and the same day the plaintiff saw and examined the barbed wire, but I do not think the mere fact of his allowing the mare to remain in the field amounted to contributory negligence. The next day the mare was found to be injured on one of her legs, just about fourteen inches from the bottom of her hoof. There was great contention as to the possibility of this injury having been caused by the barbed wire, and several witnesses were called by defendant to show they had experimented by trying to get a horse into such a position as it could touch the barbed wire, and failed to do so; but I do not attach much importance to this evidence, inasmuch as there is a great difference between forcing an unwilling horse into a certain position, and a willing horse of its own motion placing itself in that position. From the cumulative evidence of a number of facts, pointing in one direction, as to the size, shape, and position of the wound; the hoof marks at the gap, sworn to as being those of the mare; the injury being caused so soon after the wire had been put up, and so soon after the mare had been put in the field, and there being no evidence of anything else likely to cause the injury, I have no difficulty in coming to the conclusion that it was caused by a barb on the wire. I have already said that the wire was placed on the defendant's land. As a matter of fact, it was from two to three feet within his boundary, and it is consequently submitted on behalf of defendant, that, in point of law, no action will lie, as he was entitled to put what he pleased on his land, so long as the thing put there did not project into or come upon the plaintiff's land. I consider the barbed wire, placed in the position it was in, very dangerous, especially at a gap where horses had been accustomed to congregate; but, in answer to my questions, defendant's counsel contended that a man liable to fence might put up a fence which was dangerous to his neighbour's cattle if the fence was, as in this case, three feet within his own boundary. I cannot believe that to be the law. It seems to me that, if a man is liable to fence for the benefit of himself and his neighbour, he must put up such a fence as, having regard to the use to which the lands are put, is a benefit

and not a source of danger to his neighbour. To state the contrary proposition is to show its absurdity. But even if he is not liable to fence, but does put up a fence, he must, in altering the normal state of things, take care to protect his neighbour from injury (*Hawken* v. *Shearer*, 56 L. J. 284, Q. B. Div.) Nor does it make any difference that the dangerous thing is on his own property. If he makes it his fence he must, as was observed by the Lord President of the Court of Session in the Scotch case of the *Elgin Road Trustees* v. *Innes* (14 Rettie's Court of Session Cases, 48), be taken to have abandoned everything outside it for the time being, and "it must be dealt with, therefore, on the same footing as if it were on the very line of the boundary." That was a case in which barbed wire had been placed on the defendant's land, but so as to leave a narrow strip of land between the fence and the highway, and the Court held it to be dangerous to persons and cattle using the highway, and removable as a nuisance. That is the only case I am aware of where the use of barbed wire has been in question, and where it has been held that an action was maintainable though the thing complained of was on the defendant's land and never came upon the plaintiffs'. It is true the fence in that case was placed along the public highway; but I cannot see that makes any difference, except that there it was an actionable wrong to the public, whilst here it was an actionable wrong to an individual. The cases cited by Mr. Bullen as to dog-spears and spring-guns appear to me to have been decided upon very different considerations. In those cases the injuries were caused by the plaintiffs wilfully going where they had no right to be; but even then, in the majority of cases, damages were recovered. In the dog and hare case, the dog ran some considerable distance into the plantation after the hare, and was injured by a dog-spear there, and the Court held, in effect, that the owner, in taking it along a footpath through a plantation, ought to have had it under control. That is a far different case to this, where the barbed wire was dangerous to cattle lawfully in the plaintiff's field. There was not much cross-examination as to the damages, which are possibly from their nature uncertain; but as Mr. Heath put them at from £20 to £25, I think I shall be doing fairly if I assess them at £21. The verdict will be for the plaintiff for £21 and costs.

Leave to appeal was given, but the appeal was abandoned.

THE EXCLUSION OF ALIENS.

The anti-Chinese legislation, which has been for years so marked a feature of Australasian political life, has now received considerable support from a decision of the Judicial Committee of the Privy Council. Three years ago, a Chinaman named Chun Teong Toy *alias* Ah Toy, arrived at Melbourne in the British ship *Afghan*, at a time when a statute, known as the Chinese Act, was in force. Under this, and other laws restricting the immigration of the Chinese, no vessel was allowed to bring to a Victorian port more than one Chinese passenger for every 100 registered tons burden; no Chinese could land until he had paid a capitation tax of £10, and the master of the ship was liable to a fine of £100 for each Chinese passenger carried in excess of the legal number. The *Afghan*, which was entitled to bring fourteen Chinese passengers, brought two hundred and fifty-four in excess of that number. The local Collector of Customs, Mr. Musgrove, refused to permit any of the immigrants on board the *Afghan* to land. Ah Toy, who was one of them, brought an action for damages, on the ground that he was entitled to land, on tendering £10, and that the conveyance of more than the legitimate number of immigrants from China was an offence for which the master, and not the immigrant, was punishable. The case was tried in the Supreme Court of Victoria, when judgment was given for the plaintiff by a majority of the Court, and £150 damages were awarded to him. An appeal from that judgment was heard by the Judicial Committee on the 13th, 14th and 19th November last, and the judgment of the Court below was reversed on March 18th last, the Committee consisting of the Lord Chancellor (who delivered judgment), Lords Hobhouse, Herschell, and Macnaghten, and Sir Richard Couch. The record disclosed the following facts:—That the plaintiff was an alien Chinese; that he had arrived on board a vessel conveying immigrants exceeding the number which could be lawfully brought into port by that vessel; that the sum of £10 had not been paid to the Collector of Customs in respect of the plaintiff; and that the master of the vessel had offered to pay, and was always ready and willing to pay, that sum. "The question is, whether upon these facts the plaintiff has shown that

there was a breach of duty towards him committed by the defendant, and that a legal right which he possessed had been infringed." This question had first to be considered in reference to the Victorian statutes. It had been contended, on behalf of the plaintiff, that although the non-payment of £10 was *prima facie* an answer to the complaint that he had been prevented from landing, still the money had been tendered, and it was through the refusal of the defendant to receive it that the payment had not been made. "But it is obvious that this will not aid him unless he can establish that there was a legal obligation on the part of the Collector to receive that sum, and that, as the refusal to receive it constituted a breach of duty towards him, his right to maintain the action was thus made good." Was a licence to land intended to be given to any Chinese immigrant provided he paid £10 on landing? Their Lordships thought that this question must be answered in the negative. The manifest object of the anti-Chinese legislation was to "prevent an excessive number of Chinese, or what the Legislature thought to be an excessive number, from landing in the Colony, and not merely to impose a tax on those who were desirous of entering it." In the case of any ship-master who should arrive with a greater number of immigrants than the law allowed, the provision of a penalty of £100 for each immigrant so carried in excess, shows this to be the object of legislation, viz., to prevent the introduction into the Colony, by means of one vessel, of more than the limited number permitted, and not to licence it, on payment of a penalty. "It is not because the unlawfulness of an act is visited by a pecuniary penalty that the payment of that penalty makes it lawful." There is, therefore, no right on the part of an offending master to require the Collector of Customs to receive such payments, "and thus to further the purpose for which the unlawful act was committed," and no legal duty on the part of the Collector to receive such payments. But it had been urged, on behalf of the plaintiff (respondent), that whatever might have been the position of the master, each immigrant had the right to require that the Collector should receive the payment made by him, or for him. This view could not be accepted where, as here, the act of bringing the intended immigrants into port was a contravention of the law. Thus far,

their Lordships considered the case from the point of view of the Victorian Statute Law. But now, another and broader question had to be met. It had been pleaded that the Government of Victoria, acting on what it conceived to be public policy, had decided to exclude the Chinese absolutely, and at all events. On this point, various questions had been raised—whether it is a prerogative of the Crown to exclude friendly aliens, and if so, whether that prerogative had ever been delegated by Her Majesty to the Ministers at Victoria, and if so, whether the proper officer for giving or refusing access had been duly authorised by his own Colonial Government. On these "delicate and difficult constitutional questions," which were elaborately discussed in the Victorian Supreme Court, and argued with immense erudition by Sir Walter Phillimore and other counsel on the present appeal, their Lordships declined to give any opinion. They held broadly that the respondent had no right to maintain his action. "He can only do so if he can establish that an alien has a legal right, enforceable by action, to enter British territory. No authority exists for the proposition that an alien has any such right. Circumstances may occur in which the refusal to permit an alien to land might be such an interference with international comity as would probably give rise to diplomatic remonstrance from the country of which he was a native; but it is quite another thing to assert that an alien, excluded from any part of Her Majesty's dominions by the Executive Government there, can maintain an action in a British Court, and raise such questions as were argued before their Lordships on the present appeal." Under these circumstances, their Lordships were of opinion that it was impossible, on the facts disclosed in the present case, for an alien to maintain an action, and the judgment of the Court below must be reversed, but without costs.

It has thus been definitely decided that neither the Polish Jew, who pauperises the London labour market, nor the Chinaman, whose free admission into Australasia would ruin the standard of Colonial work and comfort, has any right of action if excluded by the Executive Government. We do not know the moment when the redundant population of the Celestial Empire may not flow in the direction of South Africa in pursuit of the path of least resist-

ance, and it is well to know that British law holds out no remedy to such aliens when we exclude them, as we must.

H L.B.

EVIDENCE.

The Lord Chancellor of England has prepared a Bill directed to consolidate certain enactments relating to evidence.

It is noteworthy that, in a criminal proceeding, the person charged, and the wife or husband of such party, is not competent and compellable to give evidence. In divorce proceedings, a witness, whether a party to the proceeding or not, is not to be liable to be asked, or bound to answer, any question tending to show that he or she has been guilty of adultery, unless the witness has already given evidence in disproof of his or her alleged adultery. Husbands and wives are not compellable to disclose communications during marriage. In actions for "breach of promise of marriage," a verdict or judgment shall not be given for the plaintiff unless the plaintiff's testimony be corroborated by some other material evidence in support of the promise.

The Sections relating to "Examination of Witnesses" provide, in the most explicit terms, that "in any legal proceeding" a witness may be questioned as to whether he has been convicted of any felony or misdemeanour, and if he does not admit that he has been so convicted, or refuses to answer, the person cross-examining may prove the conviction.

This branding for life of a person who has once been convicted does not find favour in the Courts of this Colony. As to whether the practice is one calculated to act as a deterrent from crime, may be an open question. But when we recollect how very few persons who commit crime can be supposed to solemnly sit down and count the probable cost before they actually commit it, it may well be doubted whether any really good purpose is served by exposing an ex-convict to the danger of having his skeleton dragged forth from the cupboard in which, maybe, he had fondly hoped it had been buried for ever. That it is an awful additional punishment is certain. There may be reasons for it in very large communities,

and it very probably increases rather than diminishes respect for the witness-box. It appears certain that eminent authorities have debated the question before the clause was introduced into the Bill, and we may therefore conclude that the decision arrived at has the weight of very great authority, and not merely that of the Lord Chancellor, although his unsupported judgment on this point would be very weighty indeed.

Other Sections prescribe the course to be followed, where it is sought by a party to discredit his own witness, and to give proof of contradictory statements of a hostile witness, and as to cross-examination of a witness upon previous statements in writing.

Part I of the Bill concludes with provisions for the "attendance of witnesses," and Part II deals with the proof and admissibility of public and other documents. As regards evidence of "colonial laws and bills," it is provided that "the certificate of the proper officer of any legislature of a British possession, or part of a British possession, to the effect that the document to which it is attached is a true copy of any law assented to by the Governor of that possession or part, or of any Bill reserved for the signification of Her Majesty's pleasure by that Governor, is evidence that the document so certified is a true copy of the law or Bill."

Evidence of foreign and colonial Acts of State may be given by the production either of an examined copy or of a copy authenticated by the Seal of the State or British possession; and with regard to judgments, decrees, orders, &c.; these may be proved by the production either of an examined copy or of a copy authenticated by the Seal of the Court to which the original document belongs, or, if the Court has no Seal, by the signature of a Judge of that Court, with a statement by the Judge that his Court has no Seal.

Part III consists of provisions for the taking of evidence by commission in civil proceedings, and Part IV deals with depositions under special Acts. Part V regulates the taking of evidence for foreign proceedings. Part VI is entitled "Ascertainment of Law." A question of law may be agreed on by the parties and, when approved by the Court, remitted to a Court in another part of Her Majesty's dominions, desiring that Court to pronounce an opinion on the questions submitted.

Although the Bill purports to be merely a consolidation of enactments relating to evidence, it is clearly something more than that. It will probably tend to a Digest of the Law of Evidence. To frame such a Digest, and a Digest of Criminal Law as well, should be no very difficult matter, and the way to this desired end has been paved by the admirable works of Sir James Stephen.

If we mistake not, § 44 of the Bill constitutes a departure from old-established principles. The Secretary of State may order evidence to be taken for the purpose of a criminal proceeding pending in any Court in a foreign country. This evidence may be taken in the presence or absence of the person charged, the fact of his presence or absence being noted in the deposition.

THE PERSONAL LIBERTY OF MARRIED WOMEN.

The judgment of the Court of Appeal, on the 19th March, in the case of *Mrs. Emily Jackson*, has placed the personal liberty of married women on a sure foundation. The Court in that case held that a husband who had obtained a decree for the restitution of conjugal rights was not entitled, in the event of his wife disregarding that decree, to gain possession of her by force, or to detain her in his custody. The Lord Chancellor, in delivering the unanimous judgment of the Court, declared that no such right as that claimed by Mrs. Jackson's husband had ever at any time existed in English law. The Court of Appeal, by this decision, has performed a very valuable public service. It has given a death-blow to the widely-spread idea, sustained by many *dicta* in the law-books, that a husband's rights are paramount in his wife's case to that personal liberty, which is the privilege of the humblest subjects.

Blackstone quaintly tells us that the disabilities of a married woman at common law "are for the most part intended for her protection and benefit, so great a favourite is the female sex of the laws of England." These disabilities owe their origin to principles honoured by English lawyers, from the common law and the Roman law, and incorporated in our jurisprudence. The extent to which our common law is drawn from these sources, especially

in its rules dealing with the relations of the family, is remarkable. Sir Henry Maine expresses his astonishment at the plagiarisms of Bracton, a third of whose treatise is directly borrowed from the *Corpus Juris*, and thinks the fact that anyone ventured on such an experiment in a country where the systematic study of the Roman law was formally prescribed, presents one of the most hopeless enigmas in the history of jurisprudence. Thus the common law, strictly interpreting the Scriptural doctrine of the unity of husband and wife, merged the legal personality of the wife in that of the husband. This principle of a wife's identity with a husband, when it appeared in English jurisprudence, produced startling results. It precluded an action being brought by a wife against a husband. It prevented married persons in trials of any sort, either criminal or civil, from being witnesses either for or against each other. It lay at the base of other rules of law which modern legislation has deemed it expedient to relax. Again, the wife, according to the Roman law, becomes, on marriage, a member of her husband's family, and subject to the *patria potestas* just as if she were her husband's daughter. This principle appearing in English law contributed to the disabilities of the wife. She came to be regarded in some respects as a subordinate person to her husband, being under his cover, protection and influence, and hence called a *feme covert*. The effect of this coverture on the wife's property may be stated in a word. It vested at common law her chattels, both real and personal, in the husband. It gave him the use of her freeholds during her life, and their use likewise, if he survived the wife, for the term of his own life, provided there had been issue of the marriage born alive and capable of inheriting. Again, the effect of coverture, as regards contracts and other transactions, was to divest the wife of all contracting power, save as the agent of her husband. The equitable doctrine of the wife's separate estate, and of the wife's equity to a settlement, and the direct legislation embodied in the various Acts dealing with the property of married women, have effected such drastic changes in the common law principles that a married woman may now, for practical purposes, be considered, both in relation to her property, her contracts, and other transactions, as if she were unmarried.

But the status of marriage, thus founded on the Roman idea of the family, was considered to affect also very powerfully the personal liberty of the wife. Thus Blackstone says that, according to old law, the husband might give his wife moderate correction, and that, although in "the polite reign of Charles II," the power of a husband to correct his wife began to be doubted, "yet the lower rank of people, who were always fond of the common law, claim and exert their ancient privilege." The last edition of Blackstone's Commentaries, edited by Stephen, and published in 1890, lays it down absolutely that "the custody of the wife's person belongs of right to her husband, and that our law still permits a husband to "restrain his wife of her liberty in case of gross misbehaviour."

The recent judgment in Mr. Jackson's case must very naturally modify this exposition of the common law. The Lord Chancellor there declared that he was not prepared to assent to the broad proposition that the mere relation of husband and wife gave the husband a complete dominion over the wife's person. No decided case had established, and no judicial authority had been cited to establish such a proposition. Again, the doctrine of the husband's power to restrain his wife's liberty in case of gross misbehaviour was thus clearly interpreted: "I do not mean," said Lord HALSBURY, "to lay it down that there may not be some acts of the wife—or a proximate approach to acts of misconduct—which might give the husband a right to some physical restraint, on the same principle as he, or indeed anyone, might restrain her if out of her mind, or likely to do herself a mischief, as, for instance, if she was about to elope with anyone; in such cases the exercise of the husband's authority to restrain her might be justified." This judgment must be regarded as a declaration of the common law right of married women to as large a share of personal liberty as is vouchsafed to any other members of the community. The liberty is still further secured by the Act of 1884, which expressly deprives the Matrimonial Court of the power of imprisoning a woman for refusal to comply with a decree for the restitution of conjugal rights.

On the whole, the judgment in Mr. Jackson's case may be regarded as the charter of the personal liberty of married women. It is as far-reaching in its effects as any of the equitable doctrines

and statutory enactments which secure the married woman in the enjoyment of her rights, and render her subject to the liabilities incident to the possession of property.

The anomalies of our marriage laws are common knowledge, but their existence could not justify any curtailment of the personal liberty of a wife.—*Law Times.*

ESTATES OF DECEASED PERSONS, MINORS, &c., BILL.

A Bill for the administration of Estates of Deceased Persons, Minors, "and others labouring under certain disabilities," has been promulgated, and will probably be favourably received. It is a Bill of forty sections, and proposes to repeal §§ 10, 18, and 28 of Ordinance 104, 1833, and provides for the following particulars being furnished by the terms of that Ordinance:—

1. The name and birth-place of the deceased.
2. The names of his or her parents.
3. The age and occupation of the deceased.
4. The day of the decease.
5. At what house, or where the deceased died.
6. Whether deceased was married or unmarried, a widower or widow, and:

(*a*). Name of surviving spouse.

(*b*). Name or names and approximate dates of death of any previous spouse or spouses of deceased.

(7). Names of children, stating separately those born of different marriages, and whether they are majors or minors, and giving, in the case of each minor, the date of birth.

8. Whether deceased has left any property, and of what kind.
9. Whether deceased has left a will.

The inventory and a copy of the goods or effects of the deceased person is to be sent to the Master of the Supreme Court by the person, other than an executor, required by law to make it, when such person resides in Capetown or the district, and when elsewhere to the Resident Magistrate of the district.

The duties of executors in framing inventories, &c., are prescribed, and executors are further bound to answer in writing such questions as the Master may put with a view of obtaining further information than that which may be contained in the death notice. Every person who, by § 14 of Ord. 104, 1833, or by § 7 of the present Bill, is directed to frame any inventory, is to include a specified list of all immovable property in which the deceased had an interest at the time of his death, a reference to the title under which deceased had such interest, and if possible, the date of such title.

Penalties are proposed for non-compliance with the provisions of §§ 14 and 16 of Ord. 104, 1833, or of §§ 4, 5, 7, 8, and 10 of the Bill.

The words "not being less than six weeks from the day of publication" in § 21 of the Wills Ordinance (104, 1833) are expunged, so that, presumably, a discretion is to be allowed the Master as to the period within which letters of administration shall be granted to persons appointed executors or executors-dative to an estate.

§ 13 provides that the Master shall furnish the Registrar of Deeds with a *daily* return, "giving the name of every married person with regard to whom, or to whose estate, an inventory has been filed, showing that such person had, at the time of his or her death, an interest in any immovable property. Such return shall embody all information respecting such property and the interest therein of the deceased, or any surviving spouse of the deceased, which is contained in every such inventory and in the will, if any, of the deceased."

§ 14 prohibits the surviving spouse, married in community, from transferring land enregistered in his or her name without the written consent of the executor of the estate of the deceased spouse, and until an account of the administration of such estate has been lodged with, and accepted by, the Master. And until such account has been filed and accepted, the survivor shall not mortgage *except* for the purpose of

(*a*) Securing to the minor heirs of the deceased spouse the inheritances due to them, or

(*b*) Raising money in order to pay such inheritances into the hands of the Master, provided that no bond allowed by this Section shall be passed without the consent in writing of the Master.

§ 15. In the case of a limited interest in immovable property being bequeathed, with remainder over after expiration of the limited interest, the executor, before framing any administration and distribution account of the estate; may either

(*a*) Transfer the property to the heir in remainder, reserving in the deed of transfer the right of the person to whom such limited interest has been bequeathed; or

(*b*) Transfer the property to the person immediately entitled to a limited interest therein, with an express reservation in such transfer of the rights of the heir in remainder; or

(*c*) Where the property is already registered in the name of the person entitled under the will to a limited interest therein, transmit the title deed thereof to the Registrar of Deeds in order that such limitation of interest may be endorsed thereon.

Executors who fail to comply with the terms of § 15, forfeit all claim to fees for administration, and, if an executor be the owner's surviving spouse, he will further be liable to a fine.

§ 16 empowers executors to obtain possession of title deeds for the purposes of § 15, and the legal rights of the person in possession of a deed are saved.

§ 17. A surviving spouse who has been appointed executor shall, as soon as the estate has been administered, and an account framed,

(*a*) Secure the inheritances ascertained by the account to be due to the minor children of the deceased spouse, by a Bond duly passed before the Registrar of Deeds;

(*b*). Pay the said inheritances into the hands of the Master.

The Bond passed under Sub-Section (*a*) will be conditioned to secure payment of the said inheritances as and when the same become due, and shall hypothecate specially the immovable property, if any, of such surviving spouse, and generally all his or her goods and effects.

§ 18. Compliance with the provisions of §§ 15 and 17, to be a condition precedent to the acceptance by the Master of any administration and distribution account, and the transmission to the Master by an executor, before such compliance, will not be deemed to be a lodging of the account as required by law.

§ 19. The word "kinderbewys," occurring in § 1 of Act 12 of 1856, and § 6 of Act 9 of 1882, in the sentence, "the customary bond or obligation, commonly called a *kinderbewys*, is to be superseded in favour of "a mortgage bond passed in terms of the sixteenth Section of the Estate Administration Act, 1891.

§ 21 provides for the excision from Ordinance 105 of 1833, § 18, of all words from "provided always that" to end; for the alteration of § 38, Act 14, 1864, to meet the case of tutors, &c., not required to furnish annual accounts to the Master; for amendment of § 3, Act 5, 1864, by relieving the surviving spouse in community, to whom the predeceasing spouse shall have bequeathed all the share in the joint estate, from rendering account to the Master unless specially ordered; § 7, Act 5, 1864, proviso expunged.

§ 22 repeals §§ 3 and 4 of Act 5 of 1861, and abolishes the following tacit hypothecs:—

(1). Tacit hypothecation possessed by minors upon the estates of their guardians and by insane persons, adjudged prodigals and interdicted persons upon estates of their curators.

(2). Tacit hypothecation possessed by legatees upon the estates of the testators by whom legacies were bequeathed.

(3). Tacit hypothecation possessed by *fidei commissary* heirs or legatees upon the estates of *fiduciary* heirs or legatees having a limited interest in the inheritances or legacies in question.

(4). Tacit hypothecation possessed by women married out of community of property upon the estates of their husbands in respect of assets belonging to such women, but administered by their husbands.

(5). Tacit hypothecation possessed by children upon the estate of their surviving parent in respect of property coming from their deceased parent.

(6). Tacit hypothecation possessed by Government in respect of overdue taxes upon the estates of persons liable to pay, or upon property affected by such taxes.

But § 23 expressly provides that the foregoing provisions of § 22 shall not affect the estate of any person who may have died before the passing of the Bill, or any right of tacit hypothecation acquired before that date. And, as regards rights of tacit hypothecation classed in sub-Sections 3 and 5 above, acquired before the Bill became law, § 24 provides:

(*a*). If the persons entitled to such rights are majors at the date of the Bill becoming law, then such rights shall not be operative upon any immovable property for a longer period than one year from that date *unless* the existence of the rights be recorded in the Deeds Office against the title of such property according to law.

(*b*). In the case of persons who are minors at the same date their rights shall not operate for more than two years from the date of their majority, subject to their being recorded as above.

"Immovable property" relates only to property within this Colony (§ 25).

§ 26 saves the rights of all persons, and of the estates of all persons, who shall have died before the Bill becomes law, notwithstanding the repeal or amendment of laws provided for.

§ 27 repeals §§ 27, 28, 29, 30, 34, and 35, of Ordinance 105, 1833, and § 13 of Act 32 of 1888, and § 3 of Act 1 1874.

§ 28 provides for the opening by the Master of a Ward's Book, being an account with each person or estate of money received under the provisions of §§ 13, 25, and 26, of Ordinance 105, 1833.

The remaining Sections of the Bill deal with the payment of interest upon moneys received by the Master, his control of such moneys, and the examination by the proper authorities each year, of the Ward Books and securities constituting the Guardian Fund Investment, with a view to the payment of interest, &c.

With regard to that portion of the Bill which simply declares alterations of the law, and abolishes hypothecations, there can be no two opinions as to its having been very carefully thought out, and it will prove a useful measure consistent with common sense requirements of the present time. But with regard to penalties prescribed in the earlier portion of the proposed measure for failure by executors, &c., to give such very elaborate particulars upon the death of a testator, there is only too much reason to doubt whether the passage of the Bill will make people one whit more ready to afford any information at all than they are now. A registration of births and deaths, strict attention to the provision of a satisfactory medical certificate as to the cause of every death, if these very simple provisions could be carried out, some useful result might be expected to follow. The difficulty in a large measure is with the rural populations. Farmers, in the majority of instances, are

not ready to recognise any necessity for their immediately giving notice, with a train of other particulars, of a death when it occurs. Time passes, and the matter is lost sight of. We very much doubt whether under the law, as it exists now, death notices are given. And besides this, in the practical working of this law, it is no easy task to institute proceedings against individuals, executors, &c., for not complying with provisions for registration, &c. If it is desired to get at definite information as to death notices, as things are at present, the forms prescribed should be as simple as possible, and the machinery of the measure, too, should be free from complication.

LAW AND LITERATURE.

Under this heading, the following, from "Ouida," appeared in the London *Times* of 3rd ult. :—

The Copyright Law having been passed by the American Chambers, it seems to me a favourable moment in which to endeavour to point out, and obtain remedy for, if possible, many sins of omission and commission which disfigure and debilitate literature at the present epoch; most of all that portion of literature which is called fiction. There was never any time in which such shoals of books were published as now, nor any in which (outside France) publication is such a matter of profound indifference to the nations. The slight attention which the Copyright Law has excited in the Press and public is a proof of this. A murder in a slum, a bacillus in a medical brain, a bridge opened by a princeling, or speech made after dinner by a fussy potentate, are, with a thousand similar insignificant things, considered much more worthy interest and curiosity than the intelligence that a gigantic, tenacious, and long invulnerable wrong has at last been, in a great measure, set right, and the fact that your intellect is worth as much as your umbrella has at length been recognised by the Congress of Washington. This new law, so honourable to the American nation, has, I think, been received in an unworthy and ungracious manner, generally speaking, by those whom it will

benefit; and some English writers have even, like Mr. Freeman, gone the needless length of pitying the poor baulked pirates who cannot comfortably plunder at their ease any more. Advantage of this example from the United States should rather have been taken by the British law-making Houses to put an end to a form of theft, as injurious as was the American which goes on utterly unchecked in Great Britain and her colonies, and unmolested by Parliamentary measures or by the pressure of an adverse public opinion—I mean the theatrical piracy of fiction. That a novel should be subject to being turned into a comedy or a drama, whether the novelist will or no, is quite as monstrous a wrong as that half-a-dozen pirated editions of that novel could compete with your authorised edition in the United States. The English robbery is quite as bad as the American one. The latter is now ended, why not the former? To myself it was less irritating to see the wretched cheap pirated editions of my novels than to see the imbecile travesties of them put upon the stage; the first do at least preserve intact the text, the second caricature it, or dovetail in with it rubbish and ribaldry, print my name on the playbills, yet offend my taste, and flout my authority with every line their puppets speak.

There is a kind, nay many kinds, of plagiarism, which no law could reach. I published in 1886 a short story called "Don Geseraldo," in which the plot turns entirely on the struggle of conscience of a priest. In 1889 appeared a French novel, entitled "Le Secret de la Terrassière," on the same subject. In 1890 appeared the English drama, *A Village Priest*, on the same subject. Comment is needless. But it may be said that the similarity might be accidental. To prove otherwise would be difficult. But that such an absurd travesty as the play called *Moths* should be permitted, with the theft of the title of the novel and the impudent and continual use of my name in advertisement, is a greater annoyance and offence than the appearance of the "unleaded" and pirated American editions of the law; and it is one which should not, in equity, be possible. Why should a man, because he calls himself "an adapter," be allowed to make money by purloining the creation of another, disfiguring and distorting it as he deems most suited to his purpose, when, were he to take another's over-

coat and alter it to suit his own stature, the police and the magistrates would speedily reckon with him? The only defence which can be alleged for permitting theatrical piracies from novels is the plea that a person who is incapable of invention may take, because they are useful to him, the inventions of others. Then, if we accept this plea, how can we reasonably punish the [cracksman and the shoplifter?

There are so many meddlesome and inquisitorial Acts of Parliament interfering with harmless liberties that it is a pity there cannot be one to render illegal all literary theft; for such a law would wrong no just man, and would only be a fitting companion to the International Copyright Act. Morality cannot be enforced by Act of Parliament, but some dishonesty may be limited by them. Plagiarism could never be prevented, but impudent, wholesale transfers of fiction to the stage, and public use of a writer's name to his injury and against his will, might with ease be rendered impossible by fines so heavy that the game of the theatrical thief would not be worth the cost of the candle which he would have to pay for it.

It seems to me that no earthly thing can be so absolutely your own as that which your mind has created; it is yours, if anything can be, by the *Natur-recht* of the German philosophy; it is even more inalienably and exclusively yours than your child, since in the latter there is a dual ownership. Yet it is this *Natur-recht* which is the most loosely and grudgingly protected of all rights. Even so careful, sincere, and wise a student as Matthew Arnold disputed its title, and called it a "metaphysical phantom." It is difficult to accept such reasoning, because, as Mr. Spencer points out, the sense of property, and recognition of its rights, existed before the forms of law were known. At any rate, in the world generally at this epoch, the rights of property are fully recognised, and offences against them are protected with a severity which is not extended to injuries which are considered of less import because less visible and less material. Therefore, the strange *lacuna* by which thefts on the creations of the mind are still permitted and tacitly encouraged, is illogical and unjust.

Were I to go to a theatre, and, annexing the title, characters, language, and plot of any play which I might see there, produce

them as a romance of mine, my act would be considered rightly as an impudent robbery, and would be punished according to law. Why, then, does the playright who annexes and uses my novel, escape this punishment?

Merely because there are no provisions in the statutes to meet the case. Mr. Herbert Spencer, who is of all men opposed to Parliamentary interference with human action, nevertheless in his admirable essays entitled "The Man *versus* the State," has the following passage: "When asserting the sacredness of property against private transgressions, we do not ask whether the benefit to a hungry man who takes bread from a baker's shop is, or is not, greater than the injury inflicted on the baker; we consider not the special effects, but the general effects which arise, if property be insecure." This is certainly true, and must be true, so long as property be recognised at all. Why, therefore, not protect the writer even as you protect the baker? Nay, the writer may sooner, perchance, claim the protection, because the thief upon his possessions cannot put forward such piteous excuse as the starving robber of the baker's loaf might do. Theatrical pirates are (like a large and continually-increasing number of what are called in the horrible jargon of the day "literary people") persons of no artistic or intellectual powers, no originality, no capacity of creation; but they have just so much intelligence as will enable them to turn to their own purposes the original conceptions of others. When they want to dress up a wooden doll for their public, they have shrewdness enough to get their lay figure from a renowned studio, and to take the finest brocades they can steal for its adorning. They will stick their own tinsel on to the brocade, and mix their own brass wire with the gold threads, and seriously think that they are improving the original stuff. They disfigure all they take; they bespatter all they borrow; they would make their Lord Chesterfield behave like a Margate Johnny, and their Count d'Orsay like a Hampton 'Arry; they would make Goethe grotesque. Boccaccio a *burgeois*, the Cid a swashbuckler, Bayard a brawler, and Milton's self a middle-class Methodist! They belittle or lampoon all they touch; they distort like a concave mirror; they have no more knowledge of the world than is folded up in a city clerk's Sunday breeches; they cannot perceive what is pathos, or

what is caricature, or what is outrage on manners, or sense, or harmony, or breeding; yet they may steal with impunity the works of their superiors, and the law lets them steal with this impunity, whilst it puts in prison the beggar who took the baker's twopenny loaf.

It is time that the balance should be more duly weighted, and if the pirates of the printing press are to steal no more, let the same just sentence go forth against that incomparably more guilty and more injurious spoiler of goods not his own—the dramatic adapter.

LUNACY LEGISLATION FOR THE COLONY.

There seems to be some ground for the opinion that the Colonial Government should undertake the passing of an Act bearing upon the important subject of Lunacy Laws. Surprising as it may seem, it is a fact that no legislation exists in reference to the legal detention of persons of unsound mind in Asylums, and the only Act in force at the present time is Act No. 20 of 1879, consisting only of a few clauses, and referring more particularly to persons found guilty of some crime or offence, and certified to be insane. These cases are sent to an Asylum on the order of the Governor, or one of the higher Courts. Other cases—and these latter represent the majority of cases sent to Asylums—are incarcerated on the authority of the Under Colonial Secretary, but it should be clearly made to appear under what enactment this official is authorised to approve of the detention of certified patients within the walls of Colonial Asylums. If the Under Colonial Secretary is not legally empowered to authorise the admission into Asylums of lunatics, then these alleged lunatics are illegally detained, and might, in certain possible circumstances, claim damages for their detention. We believe that, as a fact, from time to time printed instructions are issued from the Colonial Office bearing upon the management of the Colonial Asylums, but it is imperatively necessary for Parliament to undertake the important duty of passing a complete Act for the guidance of those concerned

in the treatment of the insane in the Colony. We propose to deal further with this subject in a future issue.

MAILLS AND DUTIES.

I'm new to the buirds o' the Parliament Hoose,
But my notions rise heich owre the riggin' o't,
Sae I dinna sit doon, like my yearlin's sae dooce,
But I spread oot my goon, an' I craw unco' croose,
"Gie's a case, an' I'll win't wi' the priggin' o't!"

I ken that I'm cleverer far than the lave,
For my faither has aften-times said it:
"Ye'll be a great lawyer, my only son Dave!
Ye'll slide frae the 'oo'-seck, na, into your grave;
Ye'll keep up the faimily's credit!"

A week or sae efter I sattled my fees—
Though my brass-plate has not yet been paid for—
I was sittin' bewailin' the scarceness o' pleas,
An' wonnerin' whan I'd begin to practeese,
When in cam' the loon I had pray'd for:

A clever young writer, wha gae to the puir
The haill o' his time an' his talents—
Conduckit their pleas withoot favour or fear—
His prospec's o' winnin' them werena aye sure—
He was ane o' the puir-awgint callants.

I gie'd him a dram, whilk the loon seem'd to like,
(It's best to keep in wi' the bodies,)
Syne he shoo'ered oot his papers, like snaw aff a dyke,
While his words they cam' bizzin' like bees frae a bike,
An' his vice rase on high—like a cuddy's.

Oor victim, it seem'd, was a Mrs. MacHitt,
Wha's man had run aff to Kirkcaldy;
He would neither come back to his hame at Parkfit,
Nor alloo her to jine him, nor help her to flit,
Tho' she wantit to bide wi' the laddie.

We discuss'd a' the p'ints o' the puir woman's case,
Alang wi' a pint o' Glenlivvet,
Till the writer-loon gat unco wuld i' the face,
While his tongue rattl'd on at a terrible pace,
An' his heid grew as rouch as a divot.

Syne I yokit on *Fraser*, an' warsl'd through *Bell*,
In *Erskine* I stuck my proboscis;
An' whan at the dawnin' the mornin' licht fell,
I'm bound to confess that I couldna weel tell
Whilk was the competent process.

I was geyly hard ca'd till I happen'd to licht
On a form whilk ayont a' dispute is,—
It was clearly inventit to keep us a' richt,
An' we've gi'en the defender a de'il o' a fricht,
Wi' a summons o' MALES AND THEIR DUTIES.

Journal of Jurisprudence and Scottish Law Magazine.

OBITUARY.

[Information for use, under this heading, should in every case be sent in without delay to the Editor, who cannot be responsible for inaccuracy, although every endeavour is made to be accurate].

MR. WILLIAM CALDWELL ELLIOTT.

We have to record the death, which took place on the 9th of last month, of Mr. William Caldwell Elliott, Attorney of the Supreme and Eastern Districts' Courts, and partner in the well-known firm of Innes and Elliott, Port Elizabeth. Mr. Elliott was the eldest son of the late Rev. William Elliott, and was born at the Paarl, on August 20th, 1832. He served his articles in the office of the late Mr. Alexander Hutchinson, in Capetown, where also his future partner, Mr. W. M. Innes, and Mr. D'Urban Dyason are understood to have served their articles. Admitted to practice in June, 1853, Mr. Elliott, in 1854, settled at Port

Elizabeth, and established a partnership with Mr. William Martin Innes, a partnership which endured until Mr. Elliott's death. Mr. Elliott was greatly beloved in private life, and his career has been the subject of considerable notice in Port Elizabeth, where he was particularly well-known and esteemed. Very quiet and unassuming in his manner, Mr. Elliott devoted himself to his profession, in which he earned the respect of all, and they were very many, with whom he was brought into contact. Being an excellent Dutch scholar, Mr. Elliott had the advantage of being able to execute all documents for Dutch-speaking countries in that language. Mr. Elliott was closely associated with various religious and philanthropic institutions in Port Elizabeth. His decease is very generally regretted, and creates a very marked gap in the ranks of the profession.

DIGEST OF CASES.

SUPREME COURT.

L. and S. A. Exploration Company v. Rouliot. (Dec. 15-Jan. 12).—The right of lateral support is a right recognised by our law. How far such right is applicable as between the lessor of claims in a diamond mine, and the lessee, discussed.

Marais v. Van Rensburg. (Jan. 13).—Husband and wife, by mutual will, gave the whole of their estate to the survivor of them for life, and then made certain bequests to their children, but stipulated that in the event of any of the said children "dying before us, the testators," then the bequests were to go to their descendants. After the testator's death, but before the death of the testatrix, one of the children died, leaving issue. *Held*,—that the child had not acquired any vested interest, and that the descendants, and not the representatives, of the child were entitled to the bequest on the death of the testatrix.

Atkinson v. The Registrar of Deeds. (Jan. 20-27.—To obviate difficulties arising from a number of persons residing at the same place having the same Christian and surnames, and for the purpose of identification, the Registrar of Deeds issued a notice that in future he would require all deeds of transfer to give, in addition to the names of the transferor, and the transferee, the names of their respective fathers. The applicant, Joshua Samuel Hitchcock Atkinson, presented for registration a deed of transfer executed in his favour by James Smith Cawood, but the Registrar refused to receive the same, as the father's name was not stated. On application for an order to compel registration, the Court indicated that by the Deeds Registry Ordinance, No. 14, 1844, the Registrar was obliged to register "all fit and proper transfer deeds and deeds of hypothecation,"

and that under the circumstances of this case, the deed tendered was a fit and proper transfer, and ought to be registered.

Mostert v. Registrar of Deeds. (Jan. 27). Applicant had passed a mortgage bond in favour of one Lindenberg, and on paying off the debt Lindenberg gave an acquittance in full and cancelled the bond. On applicant tendering the bond to have the cancellation registered, the Registrar of Deeds refused to register, on the ground that it appeared that Lindenberg had, while holding the bond, ceded it to a Bank as collateral security for advances, and that the Bank had afterwards cancelled this cession to them, which cession and cancellation had never been registered, and fees and stamps paid thereon, as required by Act No. 3, 1864. But *held*, that the Act No. 3, 1864, did not apply, and the cancellation ordered to be registered, with costs against the Registrar.

Taylor and Symonds v. Schunke. (Jan. 20-Feb. 2).—A plaintiff, not an *incola*, but who had unmortgaged landed property within the Colony of considerable value, held not liable to give security for the costs of an action instituted by him against an *incola* defendant, but such plaintiff required to give security or to have his property attached at the instance of the defendant, to secure the payment of a claim in reconvention set up by the defendant.

Sturroch v. Birt. (Feb. 2).—Plaintiff sued defendant for libel contained in a letter written to the Society by whom plaintiff was engaged as a Mission teacher. One of the charges made was, the use of intoxicants to excess, and the letter stated: "The very boys know it, said a godly woman, who was one of Miss S's bible-women, to me. A youth of 17, who was still in school, a good Christian lad, evidently knew of Miss S.'s propensity." The defendant pleaded privilege and justification. Plaintiff now applied for an order compelling defendant to furnish details of the libel, and especially to disclose who were meant by the "godly woman" and the "good Christian lad;" but the application was refused, the defamatory statements being sufficiently specific, so that the plaintiff would not be at any disadvantage at the trial.

Lane v. Sorensen. (Feb. 4).—The cesser of liability clause in a charter-party, entered into in England, frees the actual charterer at the Cape, for whom the nominal charterer in England was the agent. Where the detention of a ship is *prima facie* unreasonably long, the onus would lie on the person responsible for demurrage to explain the delay.

Re Gibbon. (Feb. 12).—An articled clerk, after serving a portion of his time, removed to the Transvaal and continued in the service of an attorney of this Court who was practising there. He then returned to the Colony and resumed service with the attorney to whom he was originally articled. The whole time served in the Colony was allowed to count, though such service had not been continuous.

Re Paarl Bank in Liquidation. (Feb. 12-16.)—A list of contributories had been framed by the Liquidators of the Paarl Bank, which was an unlimited liability institution. Three classes of past shareholders, who had been placed on the list, now applied to have their names struck off. The first-class were representatives of deceased shareholders; the second were former shareholders, who had ceased to be such before the last renewal of the period of the Bank's continuance; and the third were former shareholders, not falling within class two, who had ceased to be shareholders before the order of the winding-up of the Bank was made. *Held*, as to the first-class, that there was no contract by which they could be made contributories personally, whatever representative liability might exist; and as to the rest, that the application was premature, as there had not been any excussion of the existing shareholders, and it was not shown that the persons sought to be charged came within the provisions of the 12th and 13th Sections of Act No. 23, 1861.

Thorne & Stuttaford v. McNally. (Feb. 18).—By written contract of service, it was provided that should respondent "absent herself from business from whatever cause," applicant should be at liberty to deduct the loss of time from respondent's salary. Respondent was absent from business on several occasions, and on the last for seven days, when applicants deducted half the salary for that time. Respondent sued for, and recovered, judgment in the Magistrate's Court for the balance of salary deducted, respondent alleging that her absence was caused by illness, having caught a violent cold. An appeal from the Magistrate's decision allowed.

Boose v. Woodhead and others (Feb. 27).—The Directors of a Company presented a report to a meeting of shareholders, reflecting on the conduct of the Secretary, and containing injurious statements. After the meeting was over, the Chairman handed the report to the reporters, and it was thereafter published in the newspapers. *Held*, that though there was privilege in the communication to the shareholders, such privilege did not extend to causing the report to be published to the world, and for such publication damages given against the Director who caused the publication.

Re Union Bank in Liquidation. (March 12).—The late Hofmeyr was a shareholder in the Bank. On his death his wife took out letters of administration as executrix, and she realised all the estate except the Bank shares, which were unsaleable, and distributed the proceeds, she taking a half by virtue of the community of property, and taking with her one daughter, a child's share, under her late husband's will. An application by the Liquidators to have the wife's name put on the list of contributories for the shares held by her late husband, refused; but a *rule nisi* issued, calling upon her to show cause why she should not be ordered to pay *de bonis propriis* the calls made on the shares, to the extent of the sums paid by her as executrix to herself as surviving spouse, and to herself and to her daughter, as testamentary heirs.

Re Cape of Good Hope Bank in Liquidation. (March 12).—The Liquidators compromised with one Mills, in respect of the calls due upon his shares. Thereafter, they applied, upon notice, to have East and others, from whom Mills had purchased his shares within two years of the Bank's stoppage, placed upon the list of contributories in respect of the balance of the calls unpaid by Mills. *Held*, that there had not been such an execution, or other process in the nature of execution, issued against Mills as would entitle the Liquidators to have recourse against the former shareholders.

Queen v. Clack. (March 17).—The Graaff-Reinet Municipality, under the provisions of Act No. 45, 1882, duly promulgated a Regulation against marching in procession through the streets of the Municipality, beating drums, and playing instruments, without the previous consent of the Municipality. The defendant and others, members of the Salvation Army, were convicted of contravening this Regulation. On appeal, conviction sustained, the regulation being *intra vires* the powers conferred by the General Municipal Act.

Louw & Co. v. Theron. (April 7).—Application for an order for the Sheriff to attach defendant's books, and thereafter to collect amounts therein stated to be due to defendant, in satisfaction of a judgment obtained against him by plaintiffs, refused.

Re Wellington Bank in Liquidation. (April 7).—This Bank was being privately liquidated. The persons employed to liquidate applied for an order fixing the date up to which claims were to be sent in. No order made, the Winding-up Act not applying to private voluntary liquidations.

Stegman v. Cohen. (April 13).—A provisional order of sequestration discharged, the plaintiff in his petition not having stated that he held as security

certain life policies ceded to him, and not having placed any value on such security.

Cape of Good Hope Bank in Liquidation v. Deneys. (April 13).—The plaintiffs agreed to accept an assignment of defendant's estate, subject to the approval of the Court as required by the Winding-up Act, and also received proceeds of part of the defendant's property which had been sold. No deed of assignment had yet been drawn up, and no approval of the Court had been obtained. In order to secure recourse against the previous holder of the shares in the Bank, at present registered in defendant's name, the Liquidators proceeded compulsorily to sequestrate defendant's estate. Defendant opposed, but sequestration ordered, the agreement for assignment not having been duly concluded.

NOTES.

In his judgment in the case of *Dormer*, for contempt, in the Transvaal High Court, the Chief Justice is reported as follows: "Unfortunately, experience teaches that counsel, in their zeal for their clients, are sometimes led to make assertions and statements which will not stand the test of inquiry." And one of the counsel for the defendant was recently a colleague of the Chief Justice on the Judicial Bench.

The Journal of Jurisprudence produces the following "complicated case" from the *Louisville Courier*. It was that of a man who had succeeded in beating a "drop-a-nickel-in-the-slot" box on the corner of Third and Jefferson streets. The man who was able to perform this feat was John Lewis, and he is said to have made a thorough study of the subject before risking his nickel. He first bored a hole in the coin, and then fastened to it a small black silk thread. He then dropped the nickel in the slot as directed by the sign, and drew out a cigar. Seeing that nothing was stated in the directions as to how many times one nickel could be dropped in, he drew his nickel out and dropped it in again. Succeeding the second time, he continued to drop until he emptied the box. By the time he had drawn the twenty-ninth cigar quite a crowd had gathered around him, and cheered him on. Their cries attracted officers Schradel and Donohue, who arrested Lewis, and took him from the circle in which he had become a hero. At the

station-house the question arose as to what he should be charged with. After several suggestions of robbery, burglary, &c., it was decided to place against him disorderly conduct. He was taken out on bond a little later by some of those whose cries had attracted the police.

The same journal gives a pleasing paragraph on "Judicial Innocence." "We are quite willing to believe our honoured Judges are 'unspotted from the world' as babes unborn; but that they are so absolutely verdant as the following anecdote would seem to show, we hesitate to accept. 'Some amusing stories,' says the *Graphic*, 'are told of Mr. Justice NORTH's want of knowledge of the world. In a case which he tried when he went on circuit, it was stated that the prisoner used a meaningless adjective, common among the lower classes. In his summing-up, Mr. Justice NORTH innocently drew the attention of the jury to the admission of the prisoner that blood was upon his garments.'"

The *Canada Law Journal* reproduces a paragraph from the London *Globe*, on Index-making. The remarks will be acceptable to the many subscribers to the *Cape Law Journal* who express their appreciation of our annual index. "It would be difficult to discover an intellectual quality which the index-maker does not require. He must have a high degree of imagination in the truest sense—enough to put himself in the place of every possible student for every possible purpose, so as to know, by a sort of instinct, what each would require. He must have the logical faculty that knows what to omit, as well as what to insert; and he must know the work he deals with, not merely with mechanical precision, but with intelligent mastery. Indeed, the ordinary index-maker is in this unfortunate position—he requires qualities that would place him above his work, and yet he cannot do his work efficiently without them. The result is that there is scarcely such a thing as a really good index in the world, nor will there be until the truth is recognised of the fact that the production of more indexes to books, and not more books themselves, is the most

practically useful work in which any trained scholar can engage. A good and comprehensive index should be worth, to its compiler, the number of its words in gold; and its achievement should imply fame."

During the trial of a criminal case on the last Circuit in the Transkeian Territories, it appeared to the presiding Judge that a witness ought to be tested as to his ability to identify a person by his clothes. The witness was a Native, and he was asked by the Judge to describe the appearance of the gentleman, a member of the Civil Service, who was acting as Interpreter. The witness stated in effect that he could not do this, and the answer was accepted as proof of his not being reliable on the point upon which his evidence was being tested. It afterwards transpired that Natives will not look closely at any person whom they regard in the light of a superior, and this, of course, is the position accorded by Natives in the Territories to all members of the Civil Service. It is the occurrence of incidents such as this which causes some eminent persons in the Transkeian Territories to express the wish for a permanent Judge, in preference to a system under which a different Judge appears upon the scene every six months.

As showing the advantages of Circuit travelling in the Transkeian Territories, it is noteworthy that four out of eight horses of one of the Judge's vehicles were drowned while crossing the Tina River.

The *Western Law Times* seems to suggest that the Hon. Mr. Justice McGuire, part of whose judgment in a case (*Emerson* v. *Bannerman*, 1 North-West Terr., R. 41) is reported as follows, is a "Transcendental-Æsthetic." "The learned counsel endeavoured to show by syllogistic illustrations that the use of the words 'the creditors,' entirely changed the meaning of the affidavit, overlooking the fact that in cases of universal negatives the logicians say that both subject and predicate are disturbed. I do not know

that Mr. Bannerman is a logician, or, if so, to what school he belongs; whether to an ancient or a modern school; whether he is to be classed as an Aristotelian, an Epicurean, or a Heraclitic-Protagorean; whether his mind is of the Rhetorico-Sophistical, or Spenozistic-Metaphysical, or simply Transcendental-Æsthetic order; or is he, like so many in these Territories, a lover of Bacon? The evidence does not enlighten us on any of these points, nor do I think the omission material. The power of being able to divide a hair 'twixt south and south-west side, may be interesting to sophistical rhetoricians who have leisure and taste for such subtleties. I do not think we should avoid a bill of sale by reason of the probabilities suggested here.

The same periodical, the *Western Law Times*, takes as a compliment the fact that the size of the *Cape Law Journal* is the same as the *Western Law Times*. The *Western Law Times* was established somewhat recently, barely a year ago. The *Cape Law Journal* has flourished since the year 1884. So we certainly did not compliment the *Western Law Times* in 1884. But the praise of the *Western Law Times* is nevertheless welcomed by its "far-off contemporary," and we thank *our* far-off contemporary for the fatherly suggestion that "the legal cards in the advertising supplement would be none the worse for a little editorial revision, there being too much display to be in keeping with the high-class character of the Journal." . . . Well, the *Western Law Times* is young and—promising.

A portion of the newspaper press has recently directed the attention of the public to the performance of the duties of Interpreter, during the last two Eastern Circuits, by deputy. So long as the Government is content to allow such very important duties to be done by deputy, there seems no reason to object to any arrangement, provided the duties are well done. But there does seem ground for objection to the deputies in some places, notably in the Transkeian Circuit Courts, being Civil Service officials connected with the very Courts from which cases for trial at Circuit have been committed.

The Legislative Assembly comprises seventy-five members, including at the present time no less than five Advocates of the Supreme Court, viz.: The Hon. James Rose Innes, Q.C., Attorney-General (Cape Division); the Hon. Sir T. Upington, Q.C., K.C.M.G. (Caledon); J. H. Lange (Kimberley); J. T. Molteno (Namaqualand); and H. T. Tamplin (Victoria East).

The Eastern Districts' Court is, apparently, presumed to be lit up when ten "dip" candles, in bedroom candlesticks, are placed in various positions on the Bench, tables, and Jury box. The effect at a recent evening sitting for the conclusion of a notorious murder case, was quite ghastly.

Mr. M. B. Robinson, lately Magistrate at Beaconsfield, has been permitted, at his own request, to exchange places with Mr. H. O. Badnall, Registrar of the Eastern Districts' Court. Mr. Robinson was for some years Chief Clerk to the Solicitor-General, and is the joint author (with Mr. J. S. Curlewis) of a very useful work on the Resident Magistrates' Court Act, 1856, with notes, circular instructions and decisions thereon, published in 1888.

A Bill to amend the law relating to the Registration of Deeds has been published in the *Government Gazette*. If passed into law, it will have the effect of rendering unnecessary numerous applications to the Courts for directions to, or orders on, the Registrar. Practitioners would do well to examine the Bill, with a view to timely suggestions.

The result of the recent Census in the Districts of the "Colony Proper," "the late Province of Griqualand West, annexed in 1880," East Griqualand, Tembuland, and Transkei, the last three annexed since 1875, the date of the last Census, is as follows:— Total population, 1,524,137. Made up thus: European or white, 375,787; Aboriginal Natives, 847,231; All other, 300,119.

CONTENTS OF EXCHANGES.

The Journal of Jurisprudence and Scottish Law Magazine. Vol. 35, Nos. 410 and 411. For February and March, 1891. Edinburgh: T. & T. Clark.

No. 410. Editorial—Registration Law of 1890—Impecunious Litigants—Private Bill Legislation—Maills and Duties—Correspondence—Obituary—The Month—Reviews—English Decisions.

No. 411. Editorial—Legal Patronage and Political Preferment—Cruelty for Commercial Purposes—Transmission of Personal Obligation—Obituary—The Month—Reviews—English Decisions—Sheriff Court Reports.

The Canada Law Journal. Vol. 27, Nos. 1, 3, 4, and 5. For January, February, and March, 1891. Toronto: The J. E. Bryant Co. (Ltd.)

No. 1. Editorial—Notes on Exchanges, &c.—Reviews and Notices of Books—Proceedings of Law Societies—Diary for January—Reports—Early Notes of Canadian Cases—Division Courts—Flotsam and Jetsam.

No. 3. Editorial—Notes on Exchanges and Legal Scrap Book—Correspondence—Proceedings of Law Societies—Diary for February—Early Notes of Canadian Cases—Law Society of Upper Canada.

No. 4. Editorial—Notes on Exchanges and Legal Scrap Book—Correspondence—Diary for March—Reports—Early Notes of Canadian Cases—Osgoode Hall Library—Law Students' Department—Flotsam and Jetsam—New Rules and Procedure in High Court of Justice.

No. 5. Editorial.—Notes on Exchanges and Legal Scrap Book—Correspondence—Diary for March—Early Notes of Canadian Cases—Appointments to Office—Flotsam and Jetsam—Law Society of Upper Canada.

The Canadian Law Times. Vol. 11, Nos. 1, 2, and 4. For January, February, and March, 1891. Toronto: Carswell & Co.

No. 1. Trusts for Accumulation—The Principles of Subrogation—Inconsistencies of Practice—Editorial Review—Review of Exchanges - Occasional Notes.

No. 2.—A Century of Constitution Building—Some Recent Decisions in Maritime Law—The Reportorial Craze—Editorial Review—York Law Association—Hamilton Law Association—Book Reviews—Occasional Notes.

No. 4. Occasional Notes.

The Western Law Times. Vol. 1, Nos. 9, 10 and 11. For December, 1890, and January and February, 1891. Winnipeg: The Stovel Company.

No. 9. Parliamentary Government in the North-West Territories —Notes and Comments—Flotsam and Jetsam—Convocation Notes—Term Briefs—English Decisions—Book Reviews—Obituary—Recent Decisions.

No. 10. Parliamentary Government in the North-West Territories —Notes and Comments—Flotsam and Jetsam—English Decisions—Obituary—Recent Decisions.

No. 11. Shall we introduce the Judicature Act?—Notes and Comments—Flotsam and Jetsam—Term Briefs—English Decisions—Reviews—Recent Decisions.

THEMIS. *Verzameling van bijdragen tot de kennis van het Publiek-en Privaatrecht.* Vol. 52, No. 1, 1891. The Hague: Belinfante Brothers.

STAATSRECHT. *Parlementair of Beperkt-Monarchaal stelsel in Nederland?* Mr. P. C. Klaasesz—BURGERLIJK RECHT EN RECHTSVORDERING. *Inbreng of verrekening van schulden van een mede-erfgenaan aan den erflater*, Mr. N. K. F. Land—ROMEINSCH RECHT. *Het interdictum "quod vi aut clam,"* Mr. J. C. Naber—RECHTSGESCHIEDENIS. *Bijdragen tot de geschiedenis der Nederlandsche financiën*, Mr. F. N. Sickenga—*Een en ander over de Oud-Brabantsche strafvordering*, Mr. W. Bezemer—ALGEMEENE RECHTSGELEERDHEID. *Het adres van den Raad van toezicht en discipline voor de Orde der Advocaten te Amsterdam aan Z. E. den Minister van Justitie*, Mr. G. Brouwer — BOEKBEOORDEELINGEN — AKADEMISCHE LITERATUUR — VARIA.

NATAL LAW REPORTS. New Series, Vol 12. Part 1. For January, 1891. Maritzburg: Horne Brothers.

NOTE.—At the last moment, prior to publication, we can only briefly acknowledge, with thanks, the receipt of a beautifully compiled *menu* of he first Annual Dinner of the Manitoba Bar.

CAPE LAW JOURNAL.

THE THEORY OF THE JUDICIAL PRACTICE.

CHAPTER XX.

Part I.—Appeals.

From the earliest ages, in all countries, the right of appeal from an inferior to a superior has been claimed and allowed. This appeal was in some countries to the Chief Ruler, as among the Israelites; in other countries, as in Rome, it was at different times, either to the populace, or the King, or Emperor, or the Prætor, and later to special Courts of law.

In all civilised countries at the present day appeals are made to the law Courts. In ancient times the object of an appeal was not, or very rarely, to settle a doubtful point of law, but was almost always on facts on the alleged ground that some gross injustice had been done to the appellant by the Court appealed from. At the present day an appeal is rarely on facts alone, but chiefly on a point of law. But the object of this Chapter is to point out appeals to, in, and from this Colony, and the processes connected therewith. To simplify the subject, I will divide it into several heads:—

a. Appeals in General.
b. Appeals from the Special Justices of the Peace.
c. Appeals from Consular Courts.
d. Appeals from Magistrates' Courts.
e. Appeals from the Circuit Courts.
f. Appeals from the High Court of Griqualand West.
g. Appeals from the E. D. Court.
h. Appeals from the Supreme Court to the Privy Council.

a.—In General.

The Supreme Court of the Colony is also the Court of Appeal from all the other Courts in the land, and consists of the Chief Justice and two Puisne Judges specially assigned to the Supreme Court, but any of the Judges of the E. D. Court and High Court of Griqualand West may take part in the determination of any cause, civil or criminal, which may be brought in appeal before the Supreme Court (§ 2, Act 17, of 1886). The decision of the majority is binding (§ 33, Charter of Justice), but if the appeal be against the *unanimous* judgment of the *full* E. D. Court, or High Court of Griqualand West, such judgment *must be affirmed*, unless three or more of the Judges sitting in appeal shall concur in reversing or varying it (§ 4). It follows, therefore, that the three Judges of the Supreme Court can reverse the judgment of the three Judges of the E. D. Court, or the three Judges of the High Court of Griqualand West. This may seem to some invidious, but I have frequently found that the only satisfaction those who object to this system have is, that it is the same in England, where it is of frequent occurrence for three Judges of a higher Court to reverse the decision of an equal number of Judges of a lower Court. But in England, as well as in this Colony, the Chief Justices of the Appeal Courts have frequently invited Judges of the lower Courts to take part on appeal in important cases, and about two years ago, in England, twelve Judges took part in an appeal in a criminal case; while with us special provision is made for it by the Act.

As a general rule, every suitor who feels aggrieved by a judgment has a right of appeal to a higher tribunal from any final judgment, decision, sentence, or order of a lower Court, and the appeal must be noted and prosecuted within the time fixed by the rules of each Court (Van der Linden, 3, 1, 5, and 3, 6). It is a universal rule of law that unless the Court appealed from otherwise orders, then pending the decision of the appeal, the rights of the parties must not be changed (D. 49, 7, 1; C. 7, 62, 3). It is also a general rule in appeal cases that costs follow the result, but there may be circumstances which justify the Court to depart from this rule; for instance, where the appellant does not succeed in a material variation of the judgment (Chapter on "Costs").

No appeal lies from a sentence given against a party who is in default, or who is in contempt for non-performance, nor is an appeal allowed from a provisional sentence (Van der Linden, 3, 1, 5, §§ 1 and 5), nor is it from an interlocutory order, except by the special leave of the Judge pronouncing such order (§ 15, of Act 5, of 1879).

Any one of a number of parties to a suit may appeal without the concurrence of the others (*Reis* v. *Executors Galloway*, 1 Mens., p. 200); and there may also be a cross appeal.

In an appeal from a civil case, the grounds upon which the party appeals need not be notified to the other party, but he may appeal generally; but in appeals from certain criminal cases the grounds upon which the appeal is founded must be given at the trial, or shortly thereafter, according from what Court the appeal is made. Where no specified time is fixed by law within which an appeal must be noted and prosecuted, then it must be within a reasonable time from the date of the judgment; that is, by the first favourable opportunity; and the Court to which the appeal is to be taken is to decide, in its discretion, as to the reasonableness of the time, according to the circumstances causing the delay.

As a rule no prosecutor in a criminal case has a right of appeal unless where this right is expressly given by any local statute. By the 4th Section of Act 21, of 1876, it is provided that "no public or private prosecutor shall . . . . be entitled to bring any case, either in appeal or review, in any superior Court which could not before the passing of this Act be brought under such appeal or review." The reference in the 5th Section of Act 17, of 1886, that "it shall be lawful for a *prosecutor* or defendant in any criminal suit which shall be brought in appeal or review before the E. D. Court, High Court of Griqualand West, or any Circuit Court to appeal to the Supreme Court, &c.," . . . can refer only to where this right of appeal may have been given by statute to the prosecutor (consult *Prince Albert Board of Management* v. *Jooste and others*, 4 Juta, 400). No appeal can go to the Privy Council except it is from a judgment of the Supreme Court; so that any suitor who has instituted his case in any of the lower Courts, wishing to carry it to the highest Court of appeal, must first have a decision thereon of the Supreme Court.

Executions should always be issued out of the appeal Court giving the final judgment, and not out of the Court appealed from, except in the case of appeal to the Privy Council, then the writ for the Privy Council's judgment is to be issued out of the Supreme Court.

b.—From the Court of the Special Justices of the Peace.

A special justice of the peace has no civil, but only criminal, jurisdiction. His jurisdiction is very limited, and is intended only for certain offences of most frequent occurrence committed within the local limits assigned to him by proclamation. The records and proceedings of all cases adjudicated upon by him must be forwarded by him to the Supreme, or E. D. Court, or High Court of Griqualand West, according to the district where he holds his Court, and thereupon the 47th, 48th and 49th Sections of the Magistrate's Court Act shall be applicable (Act 10 of 1876, § 4); and an appeal or review, as the case may be, can then be made to such Higher Court upon giving the Attorney-General, or Public Prosecutor of the High Court to which the proceedings are sent, 48 hours' notice before the argument, and which notice must contain the grounds or reasons upon which the sentence is to be reversed or altered (§ 49 of Act 20 of 1856).

c.—From the Consular Courts.

By Act 3 of 1890 provision is made to appeal to the Supreme Court only from any Consular Court to be established in Africa in terms of Her Majesty's order in Council, known as the "African Order in Council, 1889." No rule or regulation has been passed as yet by virtue of that Order, but it is believed that this will very soon be done. The prescribed Courts acting under this Order will also soon be notified, and the power by this order shall be "exercised only *within and for the local jurisdiction constituted or to be constituted.* The limits of the said order shall be the continent of Africa, with the maritime and interior territorial waters thereof, and the islands adjacent thereto, and the Island of Madagascar and its dependencies, and their territorial waters," &c., &c.

In all civil matters an appeal from the Consular Court shall be direct to the Supreme Court, and from the Supreme Court it may, in all appealable cases from that Court, be to the Privy Council. Notice of appeal from a Consular Court in a civil case must be

given within two months from the date of the decision. There is no right of appeal from a Consular Court in criminal cases, except when a person has been sentenced to imprisonment exceeding twelve months or to a fine exceeding £100; but if a Secretary of State by any general or particular instructions so directs, the sentence shall be submitted to the prescribed Court of appeal for review; and the Court of appeal shall give such instructions as they think fit to give, either as to the finding of fact or as to law, or as to mitigation of sentence, and the Consular Court shall give effect to such sentence.

This leave to appeal must be applied for within a month from the delivery of the decision of the Court.

d.—From the Resident Magistrates' Courts.

In criminal cases, an appeal from a conviction of a Magistrate was formerly allowed only in certain sentences (§§ 47, 48, and 49, of Act 20, of 1856), but this right of appeal has been extended to every sentence or conviction of a Magistrate, however light the sentence or the fine may be (Act 21, of 1876, § 4).

The appeal may be made, at the option of the accused, either to the ensuing Circuit Court of the district in which the offence was committed, or to the Eastern Districts' Court, or to the High Court of Griqualand West, within their respective jurisdictions, or to the Supreme Court.

But notice in writing of the appeal must be given by the accused, or his agent, to the Clerk of the Court of the convicting Magistrate, within four days after the conviction, of his intention to appeal to whatever Court he has elected; and this appeal, if to the Circuit Court, must be prosecuted at the ensuing Circuit Court; if to a higher Court, then within 41 days after the notice of appeal, and if not prosecuted within the time mentioned, the sentence becomes final and operative (§ 4, Act 21, of 1876). By virtue of this section of the Act, the Supreme Court has refused to extend the time of appeal, because the appeal was not noted as required by the Act (*ex parte Geary*, 4 Juta, 491).

Notice of the appeal must be given to the Attorney-General or to the Public Prosecutor of the Court to which the appeal is made, 48 hours before the time of hearing, and the grounds and reasons upon which it is sought to review or alter the sentence appealed

from should be given in the notice (§ 49, Act 20, of 1856). If a private person prosecutes, due notice of appeal, or review, should be given to him also. But a prosecutor, whether public or private, is not entitled to appeal (§ 4, Act 21, of 1876; consult also *Prince Albert Board of Management* v. *Jooste and others*, 4 Juta, 400).

No security is given on appeal in a criminal case, except where an Act under which a prosecution is instituted should specifically so enact.

Whatever the result of the appeal may be, no costs are allowed to either the prosecutor or the accused (§ 49, Act 20, of 1856), unless special provision has been made for it by the Act under which the accused was charged.

In civil cases every suitor can appeal from a Magistrate's final judgment or decree, to any higher Court he pleases, either to the Circuit Court, or Eastern Districts' Court, or High Court of Griqualand West, or to the Supreme Court (§ 33, Act 20, of 1856). By leave of the Privy Council he may even appeal to the Privy Council, after the Supreme Court shall have decided upon the appeal.

The appeal should be *noted by the next Court day* with the Clerk of the Court (§ 33 of said Act); but from a Periodical Court it should be noted within 10 days (§ 7 to Schedule B, of Act 9, 1857). But as an act of favour, owing to exceptional circumstances, the Court sometimes extends the time to appeal (*Smith and another* v. *Pinto*, Buch. for 1868, p. 105). But though the time for noting an appeal may have expired, and the Court has refused the leave to appeal, yet this does not prevent the Court from entertaining an application for review, in cases where any of the grounds for review can be clearly shown (*Ghislin* v. *Syster*, Buch. for 1874, p. 57; and *Tabata* v. *Tabata*, 5 Juta, 328).

No leave or permission is required from a Magistrate to appeal from his decision. The mere depositing of the sum of £1 17s. 6d. with the Clerk of the Court, as security for the costs of conducting the said appeal, with an intimation at the same time to what Court the appeal is to be made, is sufficient. But if the appellant abandons his appeal within 14 days after the noting, he is entitled to get back this deposit, otherwise it will be applied to the payment of the costs incurred by the opposite party, and the

surplus, if any, will be forfeited for the benefit of the Crown (Rules 33 and 35, of Act 20, of 1856).

The appellant must, however, prosecute his appeal from the Magistrate's Court, if to the Circuit Court, then by the next ensuing Circuit Court for the district of such Magistrate; and if to a higher Court, then within a reasonable time after the judgment was given; for instance, during the then term of the higher Court, if at all possible, but certainly not later than the first day of the next term (*Meyer* v. *Barry*, decided August, 1878, not reported).

An appeal in a civil case from a Magistrate's Court in the Transkei and Griqualand East Territories, may be either to the Chief Magistrate thereof, or to the Eastern Districts' or Supreme Courts, as the party may elect (§ 21, Act 40, of 1882).

An appeal may be made from a Magistrate's Court judgment for costs only, though not from a higher Court (Chapter on "Costs").

No objection to the title of a plaintiff to sue can be taken on appeal which was not taken in the Court below (*Gerber* v. *Richter*, 3 Menz., 424). Nor will the Court reverse the decision of a Magistrate upon a ground of defence which was not set up in the Court below, and which did not arise on the face of the record (*Maynard* v. *Adams*, 3 Menz., 496).

In an appeal, affidavits are allowed to shew the rejection of material evidence by a Magistrate (*Jones* v. *Rhynhout*, 3 Menz., 463).

Pending an appeal to a superior Court, the Magistrate may, in his discretion, direct either that his judgment shall be carried into execution, or that it be stayed, upon proper security being given before him, by either the appellant or the respondent as the case may be, according as to whether the judgment is suspended or carried into execution, for restitution, or for the performance of such judgment or order as the appeal Court may make thereon (§ 33 of Act 20, 1856, and Rules thereto 33, 34).

The Court to which the appeal is made has the power to reverse or alter the judgment of the Magistrate, or to remit the case back to him for further evidence or information either generally or specifically for the due determination of the case. But the Magistrate cannot decide upon such additional evidence.

The Magistrate from whose judgment an appeal is made must give, in writing, a statement of the facts he may find as proved, and his reasons for his judgment (§ 7 of Act 43, of 1885).

e.—From the Circuit Courts.

f.—From the High Court of Griqualand West.

g.—From the E. D. Court.

As the process of appeals from these Courts are all the same, and to the same Court of appeal, I shall treat of them together; and first as to criminal cases. Under the heading of the "Magistrates' Court" I have instanced how and when appeals could be made from that Court; but until 1879. there was no appeal in this Colony from *criminal* cases in the higher Courts. Why this should have been, I cannot account for, as by the law of Holland there was a right of appeal in criminal cases. To get over this anomaly the Supreme Court would entertain a petition for setting aside proceedings on some legal grounds, and often did so. They could not, however, formally set such proceedings aside, but what they did was to report to the Governor the illegality of the conviction, and recommend him to quash it (*Queen* v. *Mans*, decided in 1867; and *Queen* v. *Thyaart*, decided in 1871, both for murder and the accused in each case condemned to be hanged, neither of which is reported). The Governor, though not bound to act upon the suggestion of the Supreme Court to quash the proceedings, always did so. This right to report to the Governor for the remission or reduction of a sentence, which cannot be done by the Supreme Court where there is no appeal, has been exercised by that Court also in the cases of *Queen* v. *Topken and Skelley* (1 Buch. App. 471) and *Queen* v. *Dyason*, decided in December, 1890 (not reported). The former case was to set aside a conviction, and the latter was for the reduction of a sentence, which was thought by the Supreme Court to be unnecessarily severe; and other cases may arise where the Supreme Court may have to exercise similar duties, because in their opinion the sentences should be remitted or partially so, when they have no power to do it. But since 1879 appeals are allowed from the Circuit and the higher Courts, *only in the cases provided for* (§ 22 of Act 5, of 1879).

Now the cases provided for are those in which a person tried upon any indictment thinks "that any of the proceedings of the Court are

irregular or not according to law," he may, either during the trial or after his conviction, apply to such Court to "direct that a special entry be made on the record, showing the nature of the proceedings alleged to be irregular or illegal" (§ 23 of Act 5, of 1879). When this entry is made, he may then, by leave of the Judge who tried the case, appeal against his conviction on the ground of irregularity or illegality. But he must, in addition thereto, give fourteen days' notice of his appeal to the Registrar of the Court appealed from (§ 24, Ibid). But where this notice had not been given to the Registrar as required by this Section, the appeal Court has nevertheless given leave to appeal (*Queen* v. *Hermann and another*, 1 Buch. App., 316). But no conviction shall be set aside by the appeal Court by reason only of some irregularity or illegality, or the improper admission or rejection of evidence, by which the defendant was not prejudiced in his defence, or when the Court of appeal thinks that no substantial wrong was done to him (§ 27). Thus, for instance, the appeal Court refused to disturb a verdict, given early on a Sunday morning, because it was not shown that the prisoner had in consequence suffered any substantial wrong (*Queen* v. *Hermann and another*, 1 Buch. App., 316). So also did they refuse to set aside a conviction on the ground that there had been no proper commitment of the prisoner before trial, because it was not an irregularity or illegality by which it can be said he was thereby prejudiced in his defence (*Queen* v. *Nkalaya and others*, 1 Buch. App., 175). On the other hand, where the prisoners were indicted for murder, but convicted for concealment of birth, and there was no evidence of concealment to go to a jury, the appeal Court decided this to be an "irregularity," and quashed the verdict (*Queen* v. *Elsie and Antje Thomas*, 1 Buch. App., 21).

But, as a rule, the appeal Court will not, in a criminal case, consider a question not reserved by the Court below; but where a point goes to the root of a case, and the Crown does not object, they will entertain the appeal (*Queen* v. *Braham*, 1 Buch. App., 147). So also, where no question at all has been reserved, and the Crown and the prisoners agreed to ask the opinion of the appeal Court on a question as to the validity of a conviction, the appeal Court will hear the arguments, answer the questions sub-

mitted, but can give no formal judgment, and can only report to the Governor, the expression of their opinion, which is, however, not binding on him (*Queen* v. *Topken and Skelley*, 1 Buch. App., 471). But the appeal Court will refuse to deal with a question, when its decision thereon can have no practical result upon the sentence passed upon a person (*Queen* v. *Peyper*, Ibid, 374).

The Judge may, *mero motu*, reserve for the appeal Court any question of law that may arise on the trial of any person, and order a special entry to be made on the record of the question or point of law reserved (§ 25, Act 5, 1879). No security for costs is required in the appeal, but when a sentence is suspended, the Judge may order the defendant to give bail for his appearance whenever required, or, if he be sentenced to any punishment other than simple imprisonment, that he be treated as an unconvicted prisoner, pending the appeal. The Judge may, however, in his discreton, order the sentence to be carried into execution, notwithstanding the appeal, except the case of a sentence of death, or of flogging, which must be suspended till the appeal Court has decided thereon (§ 26, Ibid).

The Court of appeal has the power either to confirm the sentence of the Court below; or to set it aside; or to set it aside and to give such judgment as ought to have been given at the trial; or if no judgment was given, then either to remit the case for judgment, or to give such judgment as ought to have been given at the trial; and if the defendant was out on bail and he gets convicted, to forthwith commit him to custody to undergo his sentence (§ 27).

A point of law in a criminal case reserved by a Circuit Judge, or an appeal from a criminal case in a Circuit Court, may be made to the E. D. Court, or High Court of Griqualand West, within their respective jurisdictions, or it may be referred or made to the appeal Court direct; but an appeal under the special Court of the Diamond Trade Act (48, 1882, § 52) may be made either to the High Court of Griqualand, or to the Supreme Court. If to the former Court, then that Court is not bound to allow an appeal, under this Act, to the Supreme Court (§ 51). Hence the appeals are always direct to the latter Court.

Though a prisoner has pleaded guilty, if he did so in ignorance of the law, the conviction may be quashed (*Queen* v. *Poley*, 8

Buch. 49); and if a person has served his sentence he may appeal, by leave of the Court, on a point reserved by the presiding Judge, but not brought to the notice of the appeal Court, until several years after, and only then because he found his career damaged by the conviction hanging over him (*Queen* v. *Brandford*, 7 Juta, 169).

The appeal Court will not allow an appeal from a certificate of a Judge, under § 47, of Act 20, of 1856, who had certified that the conviction of a Magistrate was in accordance with real and substantial justice (*re Fine*, 2 Buch. App., 113).

In Civil Cases

The rule that appeals from these Courts in criminal cases can be had only to the appeal Court, applies also to criminal cases. But while either party can appeal only to the appeal Court, the parties to a civil suit may in a Circuit Court only, within the district of the Eastern Districts' Court, by *mutual consent*, and with permission of the presiding Judge, refer a case to that Court for argument and judgment, and so may the presiding Judge also refer a case to that Court, but there is no appeal from a Circuit Court to these Courts, but only from a Magistrate's Court (§ 38, Act 21, of 1864; and § 11, of Act 5, of 1879).

Any party to a civil suit, in any Circuit Court, or the High Court of Griqualand, or the Eastern Districts' Court, may appeal to the Court of appeal, against any judgment, decision, or order of such inferior Courts. The notice of appeal may be given the moment judgment is pronounced, but it should not be later than 21 days thereafter. The notice is to be given to the party respondent, and to the Registrar of the Court from which the appeal is made, and must be prosecuted within three months from the day of the judgment, if there shall then be a sitting of the appeal Court; if not, then at the next sitting of the appeal Court. But any one of the Judges of the Court of appeal may, for good cause shown, extend the time of appeal, and so also may the appeal Court itself (§ 11, of Act 5, of 1879, and § 15, of Act 40, of 1882; *Hiscock* v. *de Wet*, *Alexander* v. *Owen*, *Queen* v. *Topken and Skelly*, 1 Buch. App., 35, 86, 473; and *Hulpert* v. *Castle Mail Packet Co.*, 6 Juta, 26).

Pending such appeal from any of these Courts to the appeal Court, it is in the power of the Judge or Court appealed from to order the judgment to be either stayed or carried into execution,

as to the Judge or Court appears to be most consistent with real and substantial justice. If the judgment is suspended, pending the appeal, the appellant must enter into good and sufficient security for the performance of the judgment as the appeal Court may decide thereon, and if the judgment is ordered to be carried into execution, then the party respondent must give good and sufficient security for the due performance of the judgment appealed from. In either case the security must be approved of by the Registrars of the respective Courts; but if from a Circuit Court, then by the Magistrate of the District. The appeal Court may, however, in either or both cases, dispense with the security of either party (§ 14, of Act 5, of 1879). In the case of *Hulpert* v. *Castle Mail Packet Co.* (6 Juta, 26), the appellant had to give security for the costs of the appeal, though he sued in the Court below as a pauper, because this privilege to sue *in formâ pauperis* is not extended to an appeal.

An appeal from a Judge in chambers must first be made to the Court where the Judge is located before it can be made to a higher Court (*Perrins' Trustee* v. *Bombael*, 7 Buch., 50).

As a general rule, the appeal Court will not reverse the decision of the Court below on a mere question of fact when there is substantial evidence to support the finding (*Leo and others* v. *Ramsbotham*, and *Murtha* v. *Allen and Laing*, 1 Buch. App., 40 and 139). But the finding must be founded on a question of fact, and not merely impressions drawn from certain other facts (*Hoole's Trustees* v. *Hudson & Co.*, Ibid, 142).

No appeal will be allowed on a question of costs only (§ 15, Act 5, of 1879). But where a defendant succeeded on appeal in obtaining a substantial reduction of the amount of damages given against him in the Court below, he was held entitled to costs of appeal, though remaining liable for the costs in the Court below; but where he only to some extent succeeded in his appeal, each party in the appeal had to pay his own costs. So also where an appellant succeeded on a point not raised in the Court below, the Court of appeal allowed the appeal, but without the costs of appeal (*Murtha* v. *Van Beek*, *Kimberley Mining Board* v. *Stanford*, *G. W. Diamond Mining Co.* v. *L. & S. A. Exploration Co.*, 1 Buch. App., 121, 129, and 239).

The appeal Court may remit, if necessary, to the Court which tried the case, any civil case, for the purpose of taking further evidence, or to take such other proceedings as may be directed (§ 28, Act 21, of 1864; § 3, Act 12, of 1880).

No provision is made compelling the Judges to give their reasons for their judgments in appeal from any Circuit Court, or from the High Court of Griqualand or the Eastern Districts' Court, though these are always given as a matter of courtesy; but when an appeal goes to the Privy Council, then the Judges of the Supreme Court must give their reasons in writing.

The records for an appeal Court must be printed, and ten days' notice of the argument should be given to the Registrar.

There is nothing to prevent a Judge sitting on appeal from his own judgment.

C. H. VAN ZYL.

THE RIGHTS OF AN UNBORN CHILD.

A very remarkable case came recently before the Queen's Bench in Dublin, Ireland. The circumstances of the case are of so extraordinary a character, that it may be as well to set them out somewhat fully.

The plaintiff, by name Annie Walker, a baby girl only a few months old, through her mother, sued the Great Northern Railway Company for £1,000 for injuries sustained in a disastrous railway collision at Armagh, Ireland.

The circumstances under which the claim came to be preferred are without precedent in the law Courts, for the plaintiff was not in existence when the accident occurred. She was *en ventre sa mere*, and her birth did not take place until six months after the accident. But when she was born, she was a cripple, in consequence, as alleged, of the injuries sustained by her mother, who was a passenger on the train. The claim in the accident was therefore, for damages for the result of those injuries, and the question before the Court was whether any action at all lay.

For the defendants, it was contended that it was absurd to hold that the plaintiff could sustain any claim in law. In the first place no contract was or could have been made between the plaintiff and the defendants, inasmuch as the plaintiff was not in the land of the living at the time. She could not buy a ticket at any rate. That would have been difficult. The law holds a Company bound to carry in safety any person whom it invites or accepts as a passenger, but there was no invitation or acceptance here. No doubt children *en ventre sa mere* were within the cognisance of the law, as in the law of descent, and in the matter of settled estates; but it could not be shown where the law had ever recognised an unborn child for the purposes of such a case as this. Where a man died leaving freehold property, and his widow is *enceinte*, the property becomes vested in a qualified owner until the birth of the child, and at its birth the child inherits; but it is not entitled to have any of the profits which accrued in the meantime. The defendants, therefore, demurred to the plaintiff's claim.

For the plaintiff, it was pointed out how the criminal law took cognisance of an unborn child. If a man administered poison to a woman who was *enceinte* and the child was still born, the offence was misprision. If the child was born alive, and died from the effects of the poison so administered, the offence was murder. The principle of the law was that the life of every human being should be protected against negligence, and it is against the spirit of that principle to say that a child should be born into the world a cripple from the injuries its mother sustained in a railway accident, and that it should yet have no claim or remedy for such injuries. An action could be maintained on behalf of an infant for injury and waste to property to which it is entitled, committed when it was *en ventre sa mere*. For the purpose of sustaining a plea of injury to an infant *en ventre sa mere*, the law recognised that the child was personally in existence—a person *in rerum naturæ*—and it was entitled to all the benefits which Courts of justice were enabled to give it for compensation for injuries suffered by it. The mother being a passenger, and having met with injuries from which the child was born a cripple, there was no reason or justice why the child should not be entitled to compensation. Supposing the child had been born in the progress of

the journey, surely it could not have been contended, if the child had been then injured, that it was not lawfully on the railway and not entitled to the same consideration as the mother, who had taken a ticket, and who was travelling on the railway at the time. Assuming that the child was, in the eyes of the law, a person entitled to bring this action, the question arose as to what duty there was in the railway company to carry that child, there being admittedly no contract with the infant. It might be urged that the child was entitled to take the benefit of the contract entered into with the mother, but this was a tort independent of contract, and a child carried on the railway under the circumstances indicated was entitled to damages. It would be hard on a child who, through the negligence of the company, was born maimed and crippled, that it should have no remedy. There was no more risk in carrying a passenger in the position the plaintiff was in at the time than in any other, if reasonable care was taken, and this case had only arisen because there had been negligence on the part of the company. Suppose a mother had a child a day old in her arms, and that neither the ticket-collector nor the other officials observed it wrapped up, could it be said that, because they were not aware she had this child in her arms, that, if it suffered from a collision such as this, an action could not be maintained? An infant *en ventre sa mere* ought to be put in exactly the same position as a child a day old in its mother's arms. Again, supposing a child had been born from the result of a collision, and that the child had been then injured, the child thereby, it was submitted, would have been entitled, just in the same way as if the child had been carried in its mother's arms. Though the law compelled railway companies to carry children up to three years of age without any charge, yet it also compelled them to use reasonable care and skill. Unless this child be shown to be in the position of a trespasser—and it was not in that position—it was entitled to be regarded as a passenger, and the same obligation rested on the company to use the same reasonable care and skill towards it that the law would have rendered necessary on their part if the child had been alive and enjoying a separate existence from the mother. The law ought to be the same with respect to the existence this child had at the time the accident happened as if it was a child born and in existence separate from the mother.

Counsel, in replying on behalf of the railway company, thought the real question had been wisely lost sight of by the opposite side. The real question for the consideration of their lordships was whether this fœtus on the particular 12th June, when the railway accident occurred, had the right of personal action vested in it which now after birth it was at liberty to assert. It was perfectly clear, on a consideration of the various cases and of the law on the subject, that there could be no claim until a child was born, and the moment they approached the point the child *en ventre* failed. The real question in the case was whether this fœtus had a separate personality from the mother so as to be able to bring an action on this 12th of June, or to have the right vested in it. His contention was that it had not; and with regard to the question of negligence, there could have been no negligence by the company that could have affected the plaintiff, because the plaintiff at that time had no personality. The duty of the company and their contract alike was not a duty to the child, but a duty to the mother. As to the point which had been raised about a child in arms, a railway company was bound to carry an infant in arms, but that was a separate person, both in the eye of the law and as a matter of common sense. In all the cases that had been cited, the child had a separate existence, a separate personality, and was a separate passenger carried. For the purpose of negligence, the company must see what they carried; and what they carried, and meant to carry, in this case was the mother, and not the mother and a child having a separate existence. It was the mother alone that was injured, and it was by reason of the mother's injury that the child suffered, and not by any injury to the unborn child. They knew that when a mother in such circumstances came to bring an action she was largely compensated by the fact that the child suffered in consequence of the injuries. Although there might have been cases of this kind within the last two hundred years, no such action had ever been attempted, and a personal action did not lie.

It was observed that railways had not been in existence for two hundred years; but, of course, an action would equally lie against a common carrier, or even a man who ran up against a woman in the street.

The Court reserved judgment, and after some two months' consideration, delivered the following decisions:—

The Lord Chief Justice said the question in the case was whether a child which sustained injuries before it was born, and was afterwards born alive, but was permanently disabled by reason of the injuries, could maintain an action, or have an action on its behalf maintained, against a railway company whose servants were guilty of conduct which would have amounted to negligence in the case of a person that was born, but who knew nothing, and had no means of knowing anything, of the child before its birth—that is to say, at the time the injuries were inflicted. Counsel for the company says no such action lies; that at the time the injuries were inflicted, when the alleged cause of action arose, the child was not a person *in rerum naturæ*; that it had no distinct personality, but was simply part of the mother; and in support of their contention they principally relied upon an undoubted proposition of criminal law—that under no circumstances is it murder to destroy a child before it is born. They quoted from Russell, page 645, where it is stated on the authority of Lord HALE, that an infant before its birth, not being *in rerum naturæ*, is not considered a person who can be killed within the description of murder; and that, therefore, if a woman being *enceinte* take any potion to procure an untimely birth, or if another give her any such potion, or if a person strike her, causing the death of the child, it is not murder or manslaughter. And they also relied upon the rule of the common law that a child *en ventre sa mere* could not until born take real property by inheritance; that the qualified heir was entitled to the rents and profits until the posthumous heir was born (*Richards* v. *Richards*, Johnson's Reports, p. 54). The child *en ventre sa mere* cannot render feudal services, and citing from Cruise's Digest, they read a passage which stated that this is the exception and not the rule, and that the child *en ventre sa mere* can take personal estate by succession and bequest. Counsel for the plaintiff strongly relied upon Sir FRANCIS BUTLER'S judgment in the famous case of *Thelluson* v. *Woodford* (4 Ves. 227). That distinguished Judge, replying to the allegation that a child *en ventre sa mere* was a nonentity, sarcastically observed, "Let us see what this nonentity can do. He may be vouched in a recovery,

though it is for the purpose of making him answer over in value. He may be an executor. He may take under the statute of distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction, and he may have a guardian." Some other cases put this beyond doubt. In *Wallis* v. *Hodson* (2 Atk., 116) Lord HARDWICKE says, that if a person knowing that a woman is *enceinte* wilfully inflicts injuries on her with a view to injuring the child, and the child is born a cripple, owing to the injuries so wilfully inflicted, an action does not lie at the suit of the child when born. He, the Lord Chief Justice, however, wished it to be clearly understood that in deciding this case he did not intend to go to this length. He was far from saying that an action would lie under such circumstances at the suit of the child when born, but before he would hold an action under such circumstances did not lie he would desire to hear further discussion as to the limitation of the rule of the civil law that a child *in utero* is considered as already born when it is necessary for the benefit of such unborn child so to consider it. He decided this case on the simple ground that there were no facts set out in the statement of claim which disclosed a duty towards the child before it was born. It was now settled law that railway companies do not warrant the safety of passengers. All they undertook was a duty to carry with due and reasonable care, and their liability for negligence arose from a breach of that duty. In *Whelan* v. *the Cork Steamship Company* (Ir. R. 8, C. L., 393) the Lord Chief Baron referred to what Mr. Justice WILLS said in *Grill* v. *the General Iron Screw Collier Company* (L. R., 1 C. P., 612). "Confusion," said that learned Judge, "has arisen from regarding negligence as a positive, instead of a negative, word. It is really the absence of such care as it was the duty of such defendants to use." In the present case there was no contract made on behalf of the child. No duty arose out of any consideration received by the defendants in respect of the child. They knew nothing about it, and in his (the Lord Chief Justice's) opinion no duty arose in respect of it. On this ground he was of opinion that the presentation was not maintainable, and that the demurrer should be allowed.

In this judgment Mr. Justice HARRISON concurred.

Mr. Justice O'Brien, in giving his decision, remarked: A woman who is with child, is in a railway accident, and the infant when born is found to be deformed; can the infant maintain an action against the Company for negligence? It is admitted that such a thing was never heard of before, and yet the circumstances which would give rise to such a claim must at one time or another have existed. But as there was a germ of life *in esse* at the time of the occurrence, so it is thought there are to be found in the principles and propositions of the law, the germs of the legal creation, which for the first time professional ingenuity has produced. The pity of it is as novel as the case—that an innocent infant comes into the world with the cruel seal upon it of another's fault, and has to bear a burden of infirmity and ignominy throughout the whole passage of life. It is no wonder, therefore, that sympathy for helpless and undeserved misfortune, has led to what is literally a kind of creative boldness in litigation. I would not myself see any injustice, in the abstract, in such an action being held to lie, or in the risks of a carrier being extended to the necessary incidents of nature; and possibly the consideration from the mother could be construed to include the child also, with but a slight further sketch in the analogy of the case of a servant and others that have been cited. But there are instances in the law, where rules of right are founded upon the inherent and inevitable difficulty of proof; and it is easy to see on what a boundless sea of speculation in evidence this new idea would launch us. What a field would be opened to extravagance of testimony already great enough, if science could carry her lamp, not over certain in its light where people have their eyes, into the unseen laboratory of nature; could profess to reveal the causes and things that are hidden there; could trace a hare-lip to a nervous shock, or a bunch of grapes on the face to fright; could in fact make *lusus naturae* the same thing as *lusus scientiae*. There may be a question of evidence, but the law may see such danger in that evidence, may have such a suspicion of human ignorance and presumption, that it will not allow any question of evidence to be entered into at all. However, we have to see whether the right claimed exists in the English legal system, or flows out of any admitted principles in that system. The law is in some respects a

stream that gathers accretions with time from new relations and conditions. But it is also a landmark that forbids advance on defined rights and engagements; and if these are to be entered, if new rights and engagements are to be created—that is the province of legislation and not of decision. Now, let us see whether the law has reached the point at which this action can be maintained, or contains any principle out of which the right can be developed by any authority short of the legislature. The criminal law has been referred to for the purpose of showing that an unborn infant is a person in law, because murder may be committed, if the infant be afterwards born and die from the effects of violence. But the criminal law is conversant with wrongs and not with rights. It regards not the person, but society. It results not in a benefit to the party injured, but in a satisfaction to the community. Crimes are invasions of natural rights and relations, among which life and personal society are the highest. In the instance put, the violence is a continuing act which takes away the life after birth, and, therefore, the legal consequence of murder is unavoidable. It would come nearer to the exigency of the case for the plaintiff, as was put in the argument, if it could be shown that a prosecution for an assault, or an action for an assault, had ever been maintained in the case of an unborn infant. As to the cases cited in reference to property, even those put by Mr. Justice BUTLER, as to what this kind of entity, a child in the womb, could do—that he could take a gift by will, could be named executor, could be vouched in a recovery, could have waste restrained—these and others are all cases of relations cast upon the infant by law, or by the act of others, and which relations must be fulfilled in some way. The rule of the civil law that made the infant a distinct person, when it was for his benefit, is supposed to include in the extent of the principle, compensation for negligence. That rule has been adopted in English law in reference to property, of which we have the best and perhaps the most extreme instance in a case to which the CHIEF JUSTICE has referred me, the case of *Blasson* v. *Blasson* (2 De Gex, Jones and Smith, 665), where it was held, that a gift to children born and living, vested in those who were unborn and were not living, except in the sense that they were not dead; while in the same case it was necessary to hold that the period of

division—twenty-one years of age, though applied to all the children alike—must still exclude the unborn children, who were included in the gift. The rule quoted from the "Digest" says: "Sui in utero sunt in toto poene jure civili intelliguntur esse in rerum natura." Yet the examples given in the "Digest," in which unborn children were severed from the mother by fiction, except as to inheritance, relate wholly to personal status and to the right of return, captivity in war, and patronage—relations and institutions unknown except to the civil law. That law did not include personal compensation for negligence. Railway shock was not as yet. But the question remains, what has the carrier to say to this invisible person of the civil law? Railway liability is a branch of the general law of carriers. The stage-coach was the predecessor of the railway. The contract of carriage is founded on consideration. To the company, as to the stage-coach manager, a person is someone who can pay the fare. The carrier saw the person he was going to carry. His duty was to that person. The carrier would be surprised to hear, while he was paid for one, that he was carrying two, or even three—for it might be a case of twins. He carries for hire. That is the fundamental account of his position and liability. The case was put of a child born and hurt during the journey. Whether the liability could be enlarged to comprehend a case of that kind, in which there was no contract and no consideration, may involve much difficulty. There one element would be wanting, the consideration; here the two are wanting, the right and the consideration. There is no person and no duty. In law, in reason, in the common language of mankind, in the dispensation of nature, in the bond of physical union, and the instinct of duty and solicitude, on which the continuance of the world depends, a woman is the common carrier of her unborn child, and not a railway company.

Mr. Justice JOHNSON, in expressing his concurrence with the foregoing judgments, pointed out that the plaintiff was not *in esse* at the time of the accident, and there was no precedent for the action.

Reference was made during the hearing the case to a large number of authorities. Counsel for the defendants quoted Cruise's Digest, Vol. 3, Title 29; Descent, Chap. 3, § 11; *Richards*

v. *Richards*, Johns 754, at pp. 762, 763; Russell on Crimes, p. 645. On the other hand counsel for the plaintiff referred to Black. Com., Vol. 1, p. 116; 3 Inst., p. 50; *Wallis* v. *Hodson*, 2 Atk., 116; *Burdet* v. *Hopegood*, 1 P. W., 486; *Blasson* v. *Blasson*, 2 De G., J. & S., 669; these latter three cases showed that a child *en ventre sa mere* is a person *in rerum naturae*, and by the rules of the common and civil law is to all intents and purposes a child. The Court will grant an injunction in his favour to stay waste: Sutterel's case, cited in *Hale* v. *Hale*, Finch's Prec. in Ch. 50, and *Musgrave* v. *Parry*, 2 Vern. 710. If a child *en ventre sa mere* receives before birth from a person a mortal wound, the act amounts to murder: *Rex* v. *Joseph Senior*, 1 Mood, C. C. 346; *Queen* v. *West*, 2 Car. & Kir., 784. Other cases cited for the plaintiff were *Dalyell* v. *Tyrer*, 28 L. J., Q. B., 52; *Marshall* v. *York, Newcastle and Berwick Railway Co.*, 11 C. B., 655; *Austin* v. *Great Western Railway Co.*, L. R. 2 Q. B. 442; *Stockdale* v. *Lancashire and Yorkshire Railway Co.*, 11 W. R., 650; *Martin* v. *Great Indian Peninsular Railway Co.*, L. R., 3 Ex. 9; *Foulkes* v. *Metropolitan District Railway Co.*, 4 C. P. Div., 267; 5 C. P. Div., 157; Bevan on Negligence, p. 641.

In the course of their judgments their Lordships quoted from the ancient law and ancient writers. Chief Justice O'Brien appealed to the rules of the civil law: "Qui in utero est perinde ac si in rebus humanis esset custoditur, quoties de commodis ipsius partus quæritur, quanquam alii, antequam nascatur, nequaquam prosit." And another expression of the same rule of civil law may also be referred to: "Qui in utero sunt in toto poene jure civili intelliguntur in rerum natura esse." And again, "Nascituri fictione samen juris pro jam natis habentur quoties de ipsorum commodo agitur." Mr. Justice O'Brien also pointed out that if any person struck a pregnant woman, or administered a potion to her whereby she miscarried, "si puerperium jam formatum vel animatum fuerit et maxime se animatum facit homicidium," Bract., lib. 3, c. 4, fol 120; and in Fleda it is stated "Qui etiam mulierum praegnantem oppresserit vel venenum dederit vel percusserit ut jaceat abortivum vel non concipiat si foetus erat jam formatus et animatus recti homicida est," Lib. 1, c. 23, § 10.

This very peculiar case was not without its element of amusement. During the course of the arguments the Lord Chief Justice asked counsel for the defendants if the child had been born on the journey what would you say? Counsel replied that case was the subject of one of the decisions he had quoted. The Lord Chief Justice thereupon remarked, it would at least be a bare licensee, which caused much merriment in Court: increased still further by Mr. Justice O'BRIEN adding, it would certainly be a bare one. Later on in the argument, the Lord Chief Justice said his mind still reverted to the question when did the cause of accident arise? Plaintiff's counsel answered, "At the time of the accident." "And were you," asked his lordship, "a reasonable creature then?" "We were *in rerum natura*." "Are you," interposed Mr. Justice O'BRIEN, "a reasonable creature now?" The Lord Chief Justice, further pursuing his inquiries, remarked to plaintiff's counsel, assuming a child in the womb is *in rerum natura*, would it not be rather unreasonable to cast a duty with reference to that child upon the railway company when they did not know whether it was *in rerum natura* or not. Plaintiff's counsel submitted that the duty was so cast upon the company. It was not an additional duty. The Lord Chief Justice: It is a different duty. It is a duty towards a different object. Counsel for plaintiff urged that assuming the child was *in rerum natura*, the status of the child was such as if it was born, and as if carried in the mother's arms. But, pointed out his Lordship, the company had no means of obtaining any knowledge as to whether the child was *in rerum natura*. What was the duty of the company towards passengers? To use reasonable care and skill, replied counsel. Is it not very hard, said his Lordship, to hold them responsible for negligence with reference to a thing they know nothing on the face of the earth about. But counsel thought it was a question of duty at law.

English and Irish opinions differ as to whether this decision is a satisfactory one or not. The English view is that, whilst the case of the child is one for sympathy and commiseration, it is clear that a judgment for the plaintiff would have made possible many doubtful and extravagant claims. Few will doubt that in this decision the wisdom as well as the majesty of the law has indicated

itself. On the other hand it is urged in Ireland, that it will be a pity, notwithstanding the weighty judgments which have been delivered in the Queen's Bench, if some effort is not made to have the point finally determined elsewhere, *i.e.*, the Court of Appeal and House of Lords, and not leave it as it now stands. It is admittedly hard, very hard, on a railway company to hold them responsible for the injuries sustained in an accident by an unborn child; but is it not equally hard that a child is born into the world a cripple for life owing to the negligence of the company's servants, and that no compensation is to be awarded to it? There is, of course, much to be said both for and against these diverse views; though, as was pointed out at the trial, the mother received £800 compensation, a handsome solatium, yet this it was agreed before the birth of the child was not be reckoned as compensation for it, if it should turn out that it had received any injury. Such a case as this offers a wide scope for legal speculation, and the authorities which have been collected will be useful if, at any future time, circumstances equally, or more, extraordinary should have to be considered and settled in a law Court.

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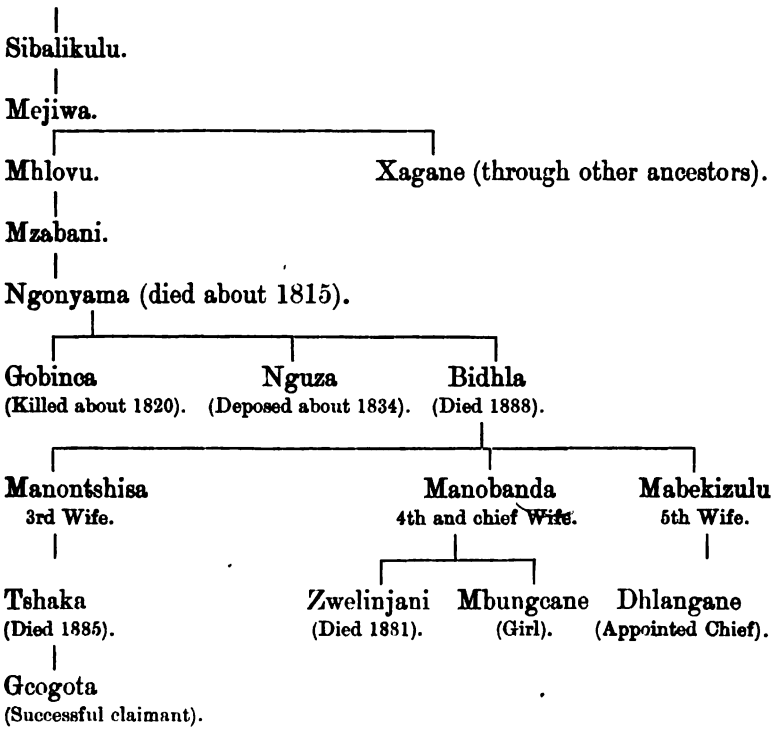
Manchester, England.

A NATIVE LAW SUIT IN NATAL.

There have been some papers in the *Cape Law Journal* showing how Native law and customs are treated by the Cape Courts. In Natal things are different; Native law and customs are recognised by statute as prevailing amongst Natives, and various Courts have been established to administer them. The lower Courts of the administrators of Native law have a limited jurisdiction corresponding to Magistrates' Courts. The superior Court is the Native High Court, which entertains all appeals from the lower Courts, and has also original jurisdiction in all matters exceeding the limits of the lower Courts; and lastly comes the Court of Appeal, which has an appellate jurisdiction only.

It may be of interest to readers of the *Cape Law Journal* to have the history of an important Native lawsuit in Natal. I must premise, however, that as I was counsel for the successful party, the narrative may be biassed, in spite of every effort at impartiality.

During the first years of this century, there lived on the Tugela, and not far from the present site of Estcourt, a large tribe, the Dhlamini. Their early history is unknown, but the line of chiefs given by the old men of the tribe carries us back far into the seventeenth century. The following genealogical tree will be useful in giving the reader some idea of their antiquity :—



Prior to the reign of Chaka, numerous tribes in Natal seem to have flourished. There were petty raids and petty fueds, which flavoured, rather than embittered, Native life. Then came Chaka, whose policy was the extermination of every tribe that opposed him and his people. Between the Dhlamini and Zululand there lived several tribes, amongst whom was the tribe under Matiwane, and another tribe called the Amabele. Matiwane found Chaka

too dangerous a neighbour, and made his way south by force of arms, till, after a long time, he reached the borders of the Cape Colony. Matiwane's passage southward was the signal for general disturbance. His removal exposed various tribes, including the Amabele, to the immediate attack of Chaka. The Amabele also marched southwards, driving before them and scattering the inhabitants along their route. It was during their attacks that Gobinca, the Chief of the Dhlamini, was killed (about 1820). This may be taken to be the first origin of the lawsuit now described.

Gobinca died without issue. With the Dhlamini, as with other Native tribes, the house of the Chief is never allowed to die, and though Gobinca left many brothers, these brothers would not step into his place, but would only raise up seed to the dead Chief, similarly with the Israelitish custom. The Dhlamini, during Chaka's reign, endured all the hardships that befell the Native tribes of Natal; they were driven south, their cattle were taken from them, they were stripped of all property, they hardly could find any means of existence, and it was not until 1833 or 1834 that they had a settled abode, which they still occupy, in the Umkomanzi Valley, about 30 miles from Maritzburg. The tribe was originally a large tribe, but broke up into several sections under Native chiefs. The Dhlamini, or what may be called the elder branch of the tribe, were under the charge of Nguza, the brother of Gobinca, as regent for the dead Chief, and as a raiser up of seed to him. Nguza seems to have been a man of violent passions, and, like Saul, flung his spear at those around him, wounding a member of the royal house, and a man called Siki, who occupied the position of premier in the tribe. The tribe met and deposed Nguza from his position, for among the Native tribes the position of chief does not confer autocratic power. Bidhla, another brother of the dead Gobinca, was elected as regent in the place of Nguza, about 1834, and the children of Bidhla were considered to be the children of the dead chief Gobinca.

The house of the chief seems to have had at this time little or no property, except the *lobola* of Gobinca's sisters. A picturesque account is given of the origin of the property of the chief house Fodo, a Chief of one of the sections of the tribe, seems to have

preserved his cattle, and in these early times, prior to the commencement of the Queen's reign, he gave Bidhla a cow, saying, "I give this to you, but I do not give it to you, I give it to Gobinca," meaning that it was for the support of the house of the deceased chief. This cow, Nkobongweni, with horns pointing downwards, the historic cow of the Dhlamini, and the *lobola* of Gobinca's sisters, was the origin of the prosperity of the tribe.

Reckoned amongst the sisters of Gobinca was one woman, whose history deserves mention, as an illustration of Native custom, and whose *lobola* figured prominently in the lawsuit occurring forty years after her marriage. Her name was Tintiwetshi, a daughter of Dumako, one of the royal family. In the early days of this century, one of the daughters of Ngonyama, the Chief of the Dhlamini, was staying with Dumako, and met her death by accident. Dumako entered the presence of his chief, threw himself on the ground and cried out, "Kill me, great chief, kill me." The chief, astonished, naturally enquired "Why?" and the only answer was "Kill me, kill me," to which of course the desired response came, "No, I will not kill you, why should I kill you?" Thereupon Dumako related the misadventure which had happened to Ngonyama's child. The wrath of the chief was restrained by his promise, but, with a shrewd eye to the property of his family, he required Dumako to replace the girl who was killed by another from his own family, and in accordance with this requirement Tintiwetshi was handed over to the family of the chief, and became as one of the daughters of Ngonyama. She was married in 1848 to a Baca, and seems to have left her tribe shortly after, though, of course, the *lobola* paid for her increased the property of Bidhla, then chief or regent.

Prior to taking his chief wife, Bidhla had married three others, the last of whom was called Manontshisa. Then came in 1856 the consultation of the head men of the tribe, the contribution of cattle from members of the tribe, and the choice of the great wife, Manobanda, the daughter and the sister of a chief. For her marriage ceremony all the people assembled. The head men gathered into a group, a ring of warriors was formed, all with shields and assegais, and within the ring stood the three wives, Manontshisa holding a small shield in her hand. The bride

Manobanda, was then introduced into the ring, and, after dancing, gave the broom she carried in her hand to Manontshisa, and took from Manontshisa the shield, which was the sign of superiority. A silence fell over the people. One of the elders, who had passed through all the troubled times of Chaka, then proclaimed, "Men of Dhlamini, to-day is given to you the wife of the tribe, Manobanda, who shall bear the chief, and with her we place Manontshisa as *Mnawe*, so that if issue of the chief wife shall fail, then shall the issue of Manontshisa take her place. The term *Mnawe*, signifying "he with you," is used with reference to any person to indicate the next youngest brother. At the time of this marriage Manontshisa had already several children, the eldest of whom was Chaka. The chief wife, Manobanda, and her handmaiden (if we may use the term) Manontshisa, were placed in the great kraal, while the other two wives were transferred to separate kraals, and, as it were, separated from the house of the chief, and given separate property. Manontshisa died, her hut was destroyed, and her children placed in the great hut under the charge of Manobanda, as if they were Manobanda's children. Manobanda bore one son, Zwelinjani, and one daughter, Mbungcane, and some six or eight years after her marriage fell ill, went to the tribe of her father, and died there in 1865.

Manobanda's death was the starting point of the troubles, which led to the lawsuit now being described. The children of Manontshisa and of Manobanda were left in the great hut with no one to take care of them, and it was therefore natural that another woman should be taken to wife by the chief to supply the place of the dead mother. This woman, named Mabekizulu, was married shortly after the death of Manobanda, the chief wife, and it was one of the questions in 1890, what cattle had been used in 1866 for her *lobola*. The contentions of the plaintiff and defendant threw interesting light on native marriage customs in Natal. When the matter came to trial, the respective claimants were the grandson of Manontshisa, the *Mnawe* of the great wife, and the son of Mabekizulu. The question of Mabekizulu's *lobola* was therefore one of great importance. For the defence it was contended that she was the *izitembu*, or woman of promise, of Manobanda, the great wife, and that her children would rank as children

of the great wife, and take precedence of the children of Manontshisa, the *Mnawe*. The plaintiff's answer to this was, firstly, that the *Mnawe* was the first of the *izitembu*, being appointed by the tribe, and not merely selected by the chief, and that her children could not be ousted from their position by subsequent wives, to whom no special position had been given by the assembled tribe. The plaintiff further contended that Mabekizulu belonged in reality to another house, and this contention was founded on the following facts:—There was a descendant of Meyiwa, one of the former chiefs of the Dhlamini tribe (see genealogical tree) who was named Xagane, and who was, of course, a relative of Gobinca and Bidhla. Xagane married a woman Matilwa, but, within six months of the marriage, he was killed by the Bacas during some of the many troubles which took place in and round the borders of Pondoland during the decade 1840-1850. As he died without issue, Bidhla directed one Sigwili, another relative, to take Matilwa to wife, in order to raise up seed to the house of Xagane, and several children were born of this marriage. Matilwa seems to have come to her second husband with only one cow of the name of Vovijiki, which has historic rank in the records of the Dhlamini, inferior only to the cow called Nkobongweni, the origin of the chieftainship property.

Just prior to the time of the marriage of Mabekizulu in 1866, the house of Xagane was represented by a very young son and four daughters, born of the marriage, or *ukungena* as it is called, of Matilwa and Sigwili. The property of the house consisted of the increase of Vovijiki, numbering some ten head of cattle. One of the daughters, Nongataive, was engaged to be married, and, according to plaintiff's version of the facts, she choose Mabekizulu to be married to Bidhla, for the purpose of increasing the house of Xagane, and with the object also of securely investing, if one may use the phrase, her own *lobola* on behalf of her family. Nongataive was married prior to Mabekizulu, and the *lobola* of Nongataive, together with the increase of Vovijiki, the second historic cow of the Dhlamini, supplied the *lobola* or marriage consideration for Mabekizulu, thus, in Native eyes, making the children of Mabekizulu a portion of the family of Xagane, and not of Bidhla.

Of course at this time Zwelinjani, the son of the chief wife, and admittedly the heir, was still living, and no dispute of any kind was likely to arise during his life. He died, however, in 1880, not without a suspicion amongst the minds of some of his tribe that Chaka, the eldest son of Manontshisa, had, by witchcraft, caused his death in order to obtain the succession. The evidence led in the case shewed indisputably that, at the mourning for Zwelinjani, old Bidhla, the Chief, and the headmen of the tribe, pointed out and proclaimed Chaka as heir apparent, and for some time everyone seems to have recognised his position. A small incident disturbed Chaka's position. Mabekizulu, who had born a son, Dhlangane, was the only wife living in the kraal of Bidhla, then a very old man in his dotage. One of the nephews of Bidhla died. His brother, by the direction of Bidhla, consulted a witch-doctor as to the cause of death, and the answer was that a woman had done it. The brother immediately accused Mabekizulu of the act. All the members of the kraal avoided her as a witch, and she had to leave the kraal. Embittered by this treatment, Mabekizulu, in September of 1883, complained to the Magistrate against the man who accused her of being a witch; the Magistrate fined him five pounds, and seems to have directed Chaka, who in his father's dotage took upon himself the management of the tribe, to see that matters were kept quiet at his kraal. Chaka, either misunderstanding, or taking advantage of, the Magistrate's directions, immediately assumed the position of Chief, and left his father with hardly any property. His father, Bidhla, instigated and controlled by his wife Mabekizulu, and by the opponents of Chaka, laid a complaint that Chaka was depriving him of all his property, and also said that Chaka was not his heir, but that Dhlangane, the son of Mabekizulu, was heir. This is admitted to have been the first announcement that Dhlangane was considered heir by anyone. The matter was brought to the notice of the Secretary of Native Affairs, with a recommendation that the question as to who was to succeed to the chieftainship on the death of Bidhla, should be immediately decided. An enquiry was made, and though almost the whole of the tribe, and every headman of importance, supported the claim of Chaka, the Secretary for Native Affairs, relying seemingly on the opinions of chiefs of

other tribes, advised the Government that he considered Dhlangane to be the proper heir under Native law, and that Dhlangane should be declared as heir to the chieftainship. Chaka was directed to remove to a distance from his father's kraal, and did so. The old Chief Bidhla died in 1888, at a very great age, and thereupon the question was again raised as to who was to succeed to the chieftainship.

The Governor, as supreme Chief of the Native population, reserves the right of appointing as chief any person he may think fit, and no one is allowed to be chief without his confirmation. In practice, the heir under Native law to what is called the property of the Great House, that is, the one who would succeed as chief under Native law is, as far as possible, appointed by Government. Another enquiry was held by the Secretary for Native Affairs, which merely resulted in the confirmation of his former advice that Dhlangane was heir under Native law, but in neither of the enquiries do all the facts seem to have come before the Secretary for Native Affairs. The Government, relying on the advice of the Secretary for Native Affairs, appointed Dhlangane chief of the Dhlamini. At this time Chaka, his rival, was dead, but was represented by a son called Geogota, for whom the majority of the tribe claimed the succession to the chieftainship. Geogota's adherents, defeated before the Secretary for Native Affairs, then resorted to legal advice. An application was made on their behalf that the Government should divide the tribe, and let each claimant be chief over his adherents. This the Governor declined to do, re-affirming the appointment of Dhlangane as chief, because according to his opinion, he was heir under Native law. The Governor at the same time stated that he, as supreme chief, did not deal with questions of property, which were left to the proper judicial Courts. Geogota thereupon instituted an action claiming that under Native law he was the real heir to Gobinca, and that Bidhla had merely been a regent, and a raiser-up of seed on behalf of Gobinca, and that he, Geogota, as such heir, was entitled to the property of the Great House, or, as we may call it, of the deceased chief. The claim of Geogota was based on the proclamation in 1856, of Manontshisa, his grandmother, as the *Mnawe* of the chief wife, or the one who should bear the chief, if the

issue of the chief wife had failed. The case for the defence rested on the appointment of Dhlangane as chief by the Governor, after an inquiry by the Secretary for Native Affairs, and on the allegation that Mabekizulu, the mother of the defendant, had been taken as *isitembu*, or woman of promise, to the Great Wife, and that her children, therefore, were in the same position as children of the Great Wife. After a trial lasting fourteen days, the Native High Court, which is the tribunal appointed for the trial of all civil cases between Natives, gave judgment in favour of the plaintiff, as the real heir under Native law, for 296 head of cattle, 16 horses, 120 sheep, 30 goats, 1 wagon, and forty-two pounds sterling, and costs. No one who has not been in a Native Court of law can conceive the roar of satisfaction with which, under the royal salute of "Bayete," this judgment was greeted by the successful party.

From this judgment the unsuccessful defendant appealed to the Native High Court of Appeal, which is constituted by the Natal Law, No. 26, 1875, § 9, in the following words:—

9. All appeals from the Native High Court shall be to a Court of Appeal, which shall be held to be, and shall be, a branch of the Supreme Court of the Colony, and shall consist of the Chief Justice, or one of the Puisne Judges of the said Supreme Court, the Secretary for Native Affairs for the time being, and the Judge of the Native High Court established under this law; and the Court so constituted shall hear and determine all appeals that shall be brought before it under the provisions of this law.

The main ground of appeal was that the appointment of the defendant as Chief carried with it the right to the property belonging to the Chief, or Great House, and that the evidence showed that the property claimed in the Court below, consisted entirely belonging to the Chief, or Great House.

The Court of Appeal was composed of Mr. Justice TURNBULL, second Puisne Judge of the Supreme Court; Mr. John SHEPSTONE, Judge of the Native High Court; and Mr. Henrique Shepstone, the Secretary for Native Affairs. Prior to the hearing of the appeal, the respondent's counsel recused Mr. Henrique Shepstone on the ground that it was impossible for him to judge impartially in the matter, seeing that he had, as Secretary for Native Affairs,

made an investigation into the facts of the case, and had advised the Government that the appellant was the rightful heir to the dead chief. Appellant's counsel, together with Mr. Henrique Shepstone, contended that the objection should be overruled because otherwise there would be no quorum to hear the case, and because the Secretary for Native Affairs was not shown to have any direct interest in the action. The respondent's counsel replied that a strong bias was of as much injury to the respondent as if the recused Judge had a pecuniary interest in the matter, and that the delay in hearing the appeal until some other Judge not interested in the matter could sit, was no reason for compelling the respondent to submit his case to an unfair tribunal. In support of the objection the following authorities were cited: Dig., 2, 1, 10; Code, 3, 1, 16, and 3, 5; Perezius ad Cod., 3, 1, 23, 24, 25; Groenewegen ad Dig., 21, 10; ad Cod., 3, 1, 16; Ant. Merenda, 4, Bk. 22, Cap. 26, §§ 1 and 2; Strykius, Lib. 4, Disp. 17, Cap. 6, §§ 11, 13, 41, 59; Voet 5, 1, 44 and 46; Leyser Medit. ad. Pandectas, Vol. 2, pp. 2 and 6; Code Napoleon, de Procedure Civile, Art. 378, § 8; *Hawkins* v. *Breda*, 3 Menzies, p. 413; Stephen's Commentaries, Vol. 3, pp. 543, 546; *Cape Law Journal*, 1888, p. 248, *Haward* v. *The State*. In opposition to the objections the chief case relied on was *Philips* v. *Hanau and Hoffa*, 2 Roscoe, Cape Rep., p. 1.

Mr. Henrique Shepstone, in giving decision on the objections, said that he did not think they were supported by the Roman-Dutch law or Native law. Mr. John Shepstone, while attaching great weight to the objections, on the whole concurred with the Secretary for Native Affairs. Mr. Justice Turnbull, the Judge of the Supreme Court, thought the objections should be upheld, as he considered the Secretary for Native Affairs could scarcely help being biassed, however much he wished to be impartial, and held this opinion so strongly as to consider himself biassed, and therefore open to recusation on that ground. Both the counsel, however, agreed to waive any grounds of recusation that there might be against Mr. Justice Turnbull. Counsel for the respondent entered a protest against the Secretary for Native Affairs sitting, and notified that he would consider any decision against his client as null and void.

The argument then proceeded; Mr. Justice TURNBULL and the Judge of the Native High Court agreed in confirming the decision of the Court below, on the grounds that the appointment by the Government of the defendant as chief did not oust the jurisdictions of the Courts with regard to property, and that according to the evidence the plaintiff was the rightful heir to that property. Mr. Henrique Shepstone, as might be expected, thought that the judgment of the Court below was incorrect, and would, if his colleagues had differed in opinion, have given judgment against the respondent.

All the proceedings in the Court of Appeal are in English; yet in spite of this, during the three days which the appeal occupied, the chamber of the Supreme Court, in which the Court of Appeal held session, was crowded with natives listening intently. The judgment of the Court of Appeal was interpreted to the Natives, and the same roar of "Bayete" resounded through the building as had been heard when the judgment was given in the Court below.

There was another incident prior to the termination of the proceedings in Court. Mbungcane, half sister of Dhlangane, the unsuccessful defendant, rose in the body of the hall, and made a violent protest against the judgment of the Court, declaring that Dhlangane was the real heir to the property, and that she did not belong to the house of Chaka. The effect of the judgment so far as she was concerned, was to remove her from the guardianship of Dhlangane into the guardianship of the successful plaintiff. Her protests were only silenced by the threat of the Court to turn her out of the building by main force.

The case is one of extreme importance, so far as the Natives are concerned, and gives a vivid insight into the intricacies, the defects, and the difficulties of Native customs. The record of this case is, I think, a convincing proof that the policy (adopted in 1848, against the protests of the colonists) of establishing a separate system of law for the Natives, and of establishing separate Courts, has been a vast mistake. It has preserved many of the worst features of barbarism, and by crystallising into written decisions fluctuating customs, has, even as regards the Natives, in many cases justified the maxim, *summum jus, summa injuria.* The

time has come to make an effort to discourage this system, and by gradually introducing a system of civilised law, to encourage and consolidate amongst the Natives the few existing elements of civilisation.

A. Weir Mason.

THE CUSTODY OF LUNATICS.

Under the ancient Roman law, the son who was delivered from *Patria Potestas* by the death of his father, remained under guardianship till an epoch which, for general purposes, may be described as arriving with his fifteenth year. The reason why the death of the father delivered the son from the bondage of the family, was the son's capacity for becoming himself the head of a new family, and the founder of a new *Patria Potestas*. The guardianship of male orphans was a contrivance for keeping alive the semblance of subordination to the family of the parent, up to the time when the child was supposed capable of becoming a parent himself. It was a prolongation of the *Patria Potestas* up to the period of bare physical manhood. It ended with puberty, for the rigour of the theory demanded that it should do so. Inasmuch, however, as it did not profess to conduct the orphan ward to the age of intellectual maturity or fitness for affairs, it was quite unequal to the purposes of general convenience; and this the Romans seem to have discovered at a very early stage of their social progress. One of the very oldest monuments of Roman legislature is the *Lex Lætoria* or *Plætoria*, which placed all free males who were of full years and rights, under the temporary control of a new class of guardians, called curatores, whose sanction was required to "validate their acts or contracts" (Maine's Ancient Law). This latter class of guardianship had its natural termination with years of discretion. But there were certain classes of men, such as deaf mutes, prodigi, idiots and lunatics, who, by reason of their infirmities, never could exercise that discretion which is necessary for the proper management of worldly affairs. Over these persons a curator was appointed to manage their affairs,

and, in the case of lunatics, to protect their persons. "Consilio et opera curatoris tueri debet non solum patrimonium, sed et corpus ac salus furiosi" (Julianus 7).

By the law of the XII Tables the agnates were appointed the legitimi curators of furiosi. "Si furiosus existat agnatorum gentiliumque in eo pecuniaque ejus potestas esto."

This law was strictly construed, and was held not to apply to the curatorship of other than raving lunatics (furiosi). To other lunatics (mente capti, as distinguished from furiosi) curators-dative were always appointed, by the prætor at Rome, or the governors in the provinces.

Justinian, in the Institutes I. 23, seems to infer that in his time curators even to furiosi were appointed by the prætor, or the governors in the provinces: "Sed solent Romæ præfectus urbis vel prætor et in provinciis præsidis ex inquisitione eis (*i.e.*, furiosi et prodigis) dare curatores" (*c.f.*, Cod. 5, 70, 7, 6; Dig. 27, 10, 13). In these enquiries by the prætor, &c., the nearest agnate was, in the absence of any disqualification, appointed curator.

Under the Roman-Dutch law no distinction was drawn between tutors and curators (Van Leeuw. Com., I, 16, 1; Grot. I, 7, 3). A trace of the old legitimi curatores, which in the early times found a place in the Roman-Dutch law (Groen. De Legis, I, 15), long survived in the Land of Voorn (Van Leeuw. Com., I, 16, 2; Grot. I, 7, 8; and Schorer Notes, XXXII). Fathers, and even mothers, could appoint curators to their children by testament. When no provision with respect to the guardianship of minor children was made by last will of the parents, it was in early times usually done by the nearest relations on the side of the paternal grandfather and grandmother. It was afterwards, however, thought preferable that this should be done by the authorities, that is by the Court of Holland or by the pupillary magistrates, who were appointed in most States in Holland to oversee the affairs of wards in the absence of testamentary guardians (Grotius, I, 7, 10; Van Leeuw., Cens. For., I, 16, 2). In the case of lunatics, however, guardians could be appointed only by the Court of Holland, or by the ordinary Judge of each State (Maasdorp's Grotius, Scho. Notes, p. 392; Van der K., I, 11, 1; Voet, 27, 10, 10; Van Leeuw., Cens. For., I, 16, 28, and authorities

there quoted). The lunatic could be discharged from the guardianship only by a corresponding order of the Judge who appointed the guardian. Such, then, was the common law regulating the appointment of curators to the property and persons of lunatics. But what became of the lunatic when his person was handed over to the curator? In order to aid us in this enquiry, let us examine the theories of the ancients with regard to insanity.

We have many examples of mental diseases recorded in the Scriptures. Saul was afflicted with melancholy, and after taking what cures his physicians prescribed, finding his case beyond remedy, it was conceived to be a visitation from on high. When Saul had been soothed and refreshed by music from the harp of David, the "evil spirit" passed away. There are many other scriptural references to the possession of human bodies by devils or evil spirits; nor is there anything very extraordinary in the origin of the notion of demoniacal possession, when we remember that there was formerly a more or less direct intercourse supposed to exist between the material and spiritual world. In slight affections of the mind, such as in melancholia, it was believed that the intellectual faculty was merely deranged by the evil influence of a demon; but where the change of character was more evident and complete, an actual exchange of the indwelling soul was supposed to have taken place. Nor was the possessed person always influenced by evil spirits. Everyone knows the passage in the Phœdras where Plato ascribes the gifts of prophecy and augury to madness granted by divine bounty: "But, now, the greatest blessings we have spring from madness when granted by divine bounty. For the prophetess at Delphi and the priestesses at Dodona, have, when mad, done many and noble services for Greece, both publicly and privately; but in their sober senses nothing," etc.

Those whose frenzies took a religious turn were thus honoured as prophets and augurs; but those who were riotously inclined were shunned, persecuted and burned. As these poor persons were rendered insane by their possession by evil spirits, their only chance of cure was through the means of religion. Accordingly, in all countries where this superstition prevailed, the treatment of mental affections was long associated with the other duties of the Sacerdotal office. Both in the North and in the South of ancient

Egypt, temples were dedicated to Saturn, who was regarded as peculiarly the God to be propitiated in these cases, where lunatics and melancholics resorted in quest of relief. The superstition survived through the middle ages. Lunatics resorted in great numbers to monasteries, the shrines of saints, and holy wells, where by prayer and fasting, and the drinking of sacred water mixed with ale and hellebore they hoped to be cured. There were, even in modern times, many wells in Cornwall and Scotland, which were supposed to have the power of curing lunatics who were immersed in them.

Pennant, writing in 1774, says in his "Tour in Scotland:" "There is an abbot living in the Vale of St. Fillan. He is pleased to take under his protection the disordered in mind; and works many wonderful cures, say his votaries, unto this day."

This is the well to which Scott refers in his Marmion:

> "Then to Saint Fillan's blessed well,
> Whose spring can frenzied dreams dispel,
> And the crazed brain restore."

But the monasteries received only the quietly-disposed lunatics. The dangerous lunatics were treated as common prisoners. They were imprisoned, kept in chains, beaten at the post; and ill-treated in every possible manner. Many were burned at the stake as wizards and witches. In Holland a criminal lunatic was not held responsible for his crime; he was, however, not suffered to be at liberty, but was confined in prison, and even bound hand and foot, not, as Carpzovius says, in order to punish him, "sed ne quid perniciosum in se ipsum aut in alios moliatur (Carpz. Rer. Crim. 3, 145, 41, 43.) In England the prisons were filled with lunatics, who were most harshly treated. They were kept chained to the walls and furniture, and were frequently beaten. There is a curious passage in one of Sir Thomas Moore's works in which he orders a lunatic to be tied to a tree and soundly beaten with rods. In Lord Campbell's "Lives of the Chancellor," we are told that it was a good plea in those days to an action for assault, battery, and false imprisonment, that the plaintiff was a lunatic, and that therefore the defendant had arrested him, confined him, and whipped him.

Asylums for the insane were first established in the East. In the year 491, we read of one existing in Jerusalem. Among the

Moors all branches of medicine were carefully studied; hospitals and asylums for the insane were common among them, and were by them introdued into Spain. The first lunatic asylum in Europe was one founded at Bedlam or Bethlehem, near London, in 1247 A.D. A religious house was founded here into which the priors, canons, brothers and sisters were required to receive any lunatics applying for admittance. The system gradually spread through Europe. In these asylums, however, the treatment of the patients was in no way better than in the gaols. They were in most cases chained, and were frequently scourged; when their frenzy, aggravated by their cruel treatment, became very acute, they were taken out and burned. As late as 1815, before a Parliamentary Commission, a patient in Bethlam Hospital, called Norris, was produced, who had been found secured by chains, consisting of (1) a collar encircling the neck, and confined by a chain to a pole fixed at the head of the patient's bed; (2) an iron frame, the lower part of which encircled the body, and the upper part of which passed over the shoulders, having on either side apertures for the arms, which encircled them above the elbow; (3) a chain passing from the ankle of the patient to the foot of the bed.

The asylums on the Continent seem to have been managed in a similar manner. The celebrated John Howard refers in his descriptions of foreign prisons to several continental asylums, notably to one at Constantinople, and the Dolhuis at Amsterdam. The asylums were not under the control or management of the State; but were the outcomes of individual enterprise. Throughout the Groot Placaat-Boeken there is only one Placaat (Vol. VI, 502, A.D. 1734) referring to lunatic asylums, and that deals only with the property of lunatics lying in the Dolhuis of Amsterdam.

In England no medical certificate was necessary for the confinement of a lunatic before the Act of 1744; and even under that Act the certificate could be signed by any druggist or chemist. This Act only referred to those who are "so far disordered in their senses that they may be too dangerous to be permitted to go abroad." This seems to have been the spirit which influenced the treatment of lunatics throughout Europe during the Middle Ages up to the beginning of the present century. The law looked rather to the protection of society than to the cure of the lunatic.

Voet (27, 10, 10) urges that great care should be taken by the Court inquiring into a lunacy case; but makes no mention of any supervision over the treatment of the patient after the appointment of a curator. Thenceforth, the person of the patient seems to have been entirely in the power of the curator, who could treat the unfortunate lunatic as he thought best. That the treatment did not always err on the side of mercy we have already seen; but of this the Court took no cognisance. All it looked to was the safety of the community, and the curator was required, at his peril, to keep the lunatic in control (Mattheuis De Crim. Proleg., C. 2, 10).

In the Cape Colony, as far as I have been able to discover, there was no legislation upon the custody of lunatics before 1833, when an Ordinance (No. 105) for providing for the due administration and management of the estates and property of minors, lunatics, and persons absent from the Colony, and for the proper care of the persons of minors and lunatics, was proclaimed. After treating of the appointment of curators over the estates of lunatics, the 11th Section in its final clause enacts: "And provided also that it shall and may be lawful for the said Master, or any other person, at any time to apply to any competent Court to make any order for the safe custody of any lunatic or insane person," etc., etc.

In 1862 the first of a series of circulars was issued by the Colonial Secretary referring to the transmission of lunatics from the country districts to the asylum in Capetown. The circular of 1862 refers to the custom as then existing, and requests the Magistrates in country districts not to transmit lunatics from the country gaols to Capetown until they have communicated with the authorities in Capetown. Up to this date no form of medical certificate appears to have been required by the country Magistrates before an alleged lunatic was received into the gaols. In 1866, however, an important circular was issued from the Colonial Office. It is worded thus:—

"To all Resident Magistrates.

"Colonial Office, 3rd Sept., 1866.

"Sir,—Much inconvenience having been experienced on account of lunatics being forwarded to Capetown for admission into the Robben Island Asylum without any certificate regarding their history, the treatment to which they have been subjected, or any

other particulars, being sent with them, I am directed by His Excellency the Governor to request that any future application which you may make for authority to forward any lunatic patient to Capetown, may be accompanied by two medical certificates, drawn up in the annexed forms, and by a statement filled up and signed by you, drawn up in the annexed form C."

In 1879, an Act (No. 20 of 1879) was passed to provide for the custody of persons dangerously insane, and for the care and custody of persons of unsound mind. It is not necessary to give any detailed account of this Act. It must be noticed, however, that the Resident Magistrates have jurisdiction only under Clause I over dangerous lunatics; and have no jurisdiction over harmless, or even criminal, lunatics. This is specifically pointed out in a circular issued in 1881, from the Colonial Office to Resident Magistrates, who are warned not to detain by force any lunatic except as described in the Act of 1879. This warning is repeated in circulars issued in 1885, and in 1890.

How the practice of detaining harmless lunatics in gaol under a form of medical certificates and an illegal warrant of a Resident Magistrate arose, is somewhat difficult to explain. I think the explanation is to be found in the fact that the country gaols are used as combined gaols, hospitals, and workhouses. In the great number of cases the afflicted person is a pauper, who wanders about the village or town uncared for and destitute. He becomes a nuisance to the public, and is apprehended as a vagrant, and medical certificates are secured certifying to his insanity. He is then lodged in gaol and kept there until there is an opportunity to remove him to Robben Island, or some other asylum. During the year 1890, there were 129 admissions into the different asylums in Capetown and Grahamstown. Of these, only 34 were admitted under Act 20 of 1879; the remainder being admitted under the provisions of the Colonial Secretary's Circulars. No doubt, many of these latter had made no resistance or remonstrance of any sort; but that illegal force has been used upon some occasions was amply proved in the case of Miss Arthur, heard before the Supreme Court upon the third day of June last.

The judgment delivered by the Chief Justice in that case (*Cape Times*, L. R., I, 132) brought to the notice of the Government the

great defect of our present legislation. A Bill has been introduced during the present Session of Parliament, which, if it becomes law, will to a great extent supply the deficiency in the present law. As the Bill has not, at the time of writing these notes, received the sanction of Parliament, and is therefore subject to amendment, it would be useless to analyse its provisions in detail. Let it suffice to say that the jurisdiction now enjoyed by Magistrates over dangerous lunatics, the Bill proposes to extend to a jurisdiction over all alleged lunatics, whether harmless, dangerous or criminal. When the Magistrate is satisfied upon the evidence of two medical practitioners and other persons, that the alleged lunatic is insane, he may make an order for the detention of such person in some hospital or other place of confinement.

This order, however, is in all cases merely a provisional order. The Magistrate is required without delay to transmit a copy of his order, together with copies of the depositions and medical reports upon which he acted in granting the order, to the Attorney-General, or the Solicitor-General, or the Crown Prosecutor, who are appointed within the Districts respectively in which they exercise their functions, as *ex-officio curatores ad litem* of all persons detained under any order granted by a Magistrate under the Bill. These copies of the depositions and reports are, within one month, to be laid before a Judge in chambers, who may order *inter alia* the alleged lunatic to be discharged or to be detained for such period as he may deem necessary. Upon such latter order, the Under-Colonial Secretary may authorise the removal of such lunatic to some asylum, hospital, or other safe place of confinement, there to be detained until legally discharged.

Such are, in brief outline, the more important provisions of the Bill. There are many Sections which, as they now stand, are open to serious objection; but it is useless to draw attention to them in detail, as, no doubt, they will have been satisfactorily amended before these notes are in print.

WALTER S. WEBBER.

[We regret that the space at our disposal does not admit of the publication of the Colonial Office Circular of 1890 to Magistrates, giving directions with regard to lunatics, &c., now, of course, superseded by the Bill which has become law.—ED. *C.L.J.*]

DESCHAMPS v. VAN ONSELIN.

Judgment was given on the 11th June in the Eastern Districts' Court in the above case (removed from the Circuit Court of Port Elizabeth) which involved the important question whether the *Lex Anastatiana* applies to the sale of debts, for legal consideration, in this Colony. The facts were as follows:—

On October 18th, 1858, one, Landman, sold to defendant one-fifteenth share in the farm "Hartebeestfontein," district of Humansdorp, for £200; on April 1st, 1859, Landman passed transfer of it to defendant, who paid £100 on account of the purchase amount; on October 20th, 1868, defendant signed an acknowledgment of debt in Landman's favour for the balance of £100, payable 20 years after date, with interest at 2 per cent. per annum, which interest defendant paid up to 1876, in terms of a memo. Landman then died, his wife (married to him in community of property) being appointed his executrix; the above-named acknowledgment of debt, however, being mutilated, defendant signed a new one in the same terms as the former; on March 7th, 1883, Landman's wife, for herself and as executrix, for valuable consideration, ceded to plaintiff all her right and title to this £100, with interest due and to become due, and handed plaintiff the acknowledgement; on September 26th, 1890, the terms of this cession were embodied in a document signed by Landman's wife; upon which plaintiff claimed £100, with interest at 2 per cent. per annum from 1876.

At Port Elizabeth defendant abandoned the special defence pleaded, and in a consent-paper the following facts were presented to the E. D. Court, viz., "that full consideration was given by defendant to the payee of the original promissory note for £100; that the promissory note was passed by the executrix of the payee to plaintiff for £38, being partly in payment of a debt due by her to the plaintiff, and partly for cash paid to the executrix by the plaintiff; at the time of the transfer of the promissory note to plaintiff it was agreed between plaintiff and the executrix that, in consideration of the risk attaching to the recovery of the amount of the acknowledgment of debt, and of the period still to elapse before the due date of the same, the plaintiff should pay the lesser sum of £38 for the acknowledgment, and should take upon himself all the risk

attaching to its recovery." It did not appear that, before the removal of the case from Port Elizabeth, defendant claimed any right of stepping into plaintiff's shoes, either by tendering the £38 and interest, or even by offering to pay it, and his counsel contended that upon the evidence as it stood the plaintiff was never entitled, and never could be entitled, to a judgment for more than £38, with interest.

Upon these facts, the JUDGE-PRESIDENT, after referring at length to the history of the *Lex Anastatiana*, came to the conclusion that that law did not apply to the present case. He said: "I cannot come to the conclusion that the *Lex Anastatiana*, as set forth in Cod. 4, 35, 21, prohibited the present sale. The *Lex* begins by describing what class of rights of action and what sorts of cessions are to be prohibited, namely, undoubted obligations which covetous persons attempt to obtain with the object of dabbling in law-suits with the object of vexing debtors, and taking advantage of the circumstances of the original creditor, by getting from him what he would rather not part with; and then, having stated this, the enacting part of the law does not generally prohibit all cessions, but only those of the character described. It may be that what is limited to certain sorts of purchases in this was by the Roman-Dutch law extended to all purchases of rights of action, and it is said by Voet (18, 4, 18) 'that a rule has grown up in our practice that when a debtor is sued in pursuance of a transferred right of action, he may require the plaintiff to declare on oath for what price he bought the claim, so that the debtor may discharge himself by tendering the same amount.' It is also said that the general rule is subject only to certain exceptions, two of which are stated by Van der Keessel, and another added by Voet, and that the general rule is only qualified by these exceptions. But seeing that Voet, in stating this rule, refers to Hollandsche Consultatien, Vol. 5, Con. 89, with apparent approval, and in 18, 4, 20, says 'that this right of tendering the price, in other words, of retraction, is barred in the sale of a number of rights of action collectively, because the price for each cannot be defined—notably where claims have been purchased at a cheaper rate owing to the calamities of war or other like troubles, so that the purchaser runs a risk of total loss; since it is fair that the advantage derivable from a

thing should go to the person who suffers the disadvantages, and that the hope of gain should belong to him who has had the fear of loss. Opinions have been given to that effect by various Dutch jurists. The same view has been confirmed by a decree of the States-General of Holland, and has been specially applied to claims vested in the governing bodies of provinces and municipalities which had been sold at a sacrifice in critical time of war;' whether we call this an exception, or treat it as an illustration of cessions under circumstances to which the prohibition does not apply, it seems to me that the special circumstances in the present case are outside of the rule, and come within the meaning of the term *alia incommoda*, because the risk run by plaintiff added to the substantial price he gave, shows that the executrix got full value for her right of action; and even if we consider the exception to apply to cases where the purchaser runs the risk of a total loss, the defendant's plea debars him at least from saying that plaintiff did not run such risk. If we look at the Hollandsche Consultatien (Vol. 5, Con. 89), to which Voet refers with approval, it appears that the jurisconsults refer to Code 4, 35, 22 and 23, as stating the law, and add: 'As the above texts only speak of the purchasers of others' law-suits with the object of vexing and attacking, and as the actions or loans which originally belonged to citizens of other States, and are now alleged to belong to citizens of this State, who have by cession obtained right to the same during the war, it cannot be said that the claimants have obtained cession with the object of vexing or buying a lawsuit, but rather that the same has taken place for some just and reasonable cause in consideration of the uncertainty connected with the recovery and acquisition of the same, the result of which depended absolutely on an uncertain event, inasmuch as in the case of war the cessionaries might have recovered nothing, and might even have lost the money paid, and inasmuch as they have the risk of the said price,' . . . and proceed: 'No one in these troublous times would have given more for them,' and quote with approval an opinion that the '*Lex Anastatiana* does not apply if, together with the debt and the action purchased, the risks and uncertainty of recovery are also transferred to the purchaser, because such a cession has a reasonable cause, and the lowness of the price is compensated by the risk of

the uncertainty, nor can it be said to have been made with the object of vexing or buying a law-suit,' and add 'that Trent says that the constitution ceases to apply if the ceded action would very likely not have been worth more than what was paid for it and that consequently the ceded action may be prosecuted for the full amount.' This reasoning approved by Voet gives rise to what is called an exception to the rule, but which in realitiy only shows that there are circumstances under which cessions of actions are not prohibited, and that the law does not prohibit purchases for which fair value is given in addition to risk of loss being incurred, provided the object be not to vex the debtor with law-suits. Such an object cannot be said to exist here, and if there be a desire to vex in this way, the plea of defendant rather proves that vexation has been his object and not plaintiff's, and as I think that the executrix got fair value for what she sold, there is no prohibition to sell, and plaintiff can recover the whole debt, which defendant, moreover, cannot be heard to say was an undoubted obligation. It also appears to me doubtful whether the defendant would have been entitled to claim the benefit of *retractus* without stepping into plaintiff's shoes, or at least offering to do so. This he has never done. Voet, in the passage quoted, seems to imply that there should be a tender of the price found to have been paid for the debt preliminary to a debtor succeeding to the rights against himself under the obligation. As my brother Judges concur in reducing the amount of the judgment to £38, with interest from March 7th, 1883, that will be the judgment of the Court, and in my opinion that judgment ought to carry costs to date, inasmuch as the argument here was a mere continuation of the trial at Port Elizabeth, where, if judgment had been given, it must have carried costs. I need scarcely point out that, if the judgment of this Court be correct, it will be found to be a very inconvenient one in a mercantile community, and that inasmuch as creditors have no longer the power over debtors which existed in times past, some amendment of the law would be desirable."

From this view JONES, J., differed. Having pointed out that, as a matter of fact, no actual tender of £38 had been made by defendant, he reviewed the history of the *Lex Anastatiana* at length, and observed upon the general question whether the modi-

fied Anastatian Law was applicable in Holland: "Schorer says that the right of retraction, or *Naasting*, was in vogue in Holland from very early times, and he refers to a charter of 1297, and from Grotius (3, 16 *passim*); the principle of retraction seems to have been applied very generally in the Netherlands to immovables as well as to rights of action. Grotius (3, 16, 14), writing in A.D. 1620, lays it down that whenever a debt is sold to a third person, the debtor may at any time (Groenewegen says within a year, basing his opinion upon local laws of Delf and Rhynland) upon receiving notice retract the debt, or in other words, step into the place of the purchaser (*om te treden in des koopers plaatse*), as he explains the doctrine. Voet lays down the law clearly in 18, 4, 18: 'A rule has grown up,' he writes, 'in our practice, that when a debtor is sued in pursuance of a transferred right of action, he might require the plaintiff to declare on oath for what price he bought the claim, so that the debtor may discharge himself by tendering the same amount, and that the debtor gains all the difference between the amount and the sum originally due is evident from the fact that neither the purchaser nor the vendor is allowed an action for anything beyond the price paid by the latter (*Quod; utrimque tum emptori, tum venditori actio ultra id, quod emptor dedit denegata est.*) And it is not enough to declare on oath the price promised; he must declare the amount truly and honestly paid or delivered (and here he refers to the passage already referred to, derived from the Basilica). And what has been said of sale applies also according to the latter opinion, to delivery of a specific thing by way of payment, (*Et quæ de venditione dicta sunt, in datione in solutum etiam obtinere verius est*), since retraction is allowed in that transaction as in sale, as was stated in the preceding title, and since it is a substitute and equivalent for a sale, and the claim is considered to have been sold for a sum equivalent to the amount of the debt in satisfaction of which it was transferred, ... (Sec. 19 in.) 'Where no particular period is fixed by statute, it is enough for the debtor to tender the same price as that given by the cessionary as soon as he is sued for payment.' In the next note (Sec. 20) the exceptions which the Dutch law allowed are clearly stated: (*a*) 'This right of offering or retraction is destroyed if, at the time of the sale, an opportunity of

purchasing was offered to the debtor for the same price and he declined to purchase; (*b*) So also, if the sale be of a number of rights of action collectively (*actionum plurium universitas*), as when a merchant sells his entire list of book-debts, or when many actions are included in an inheritance which is sold; since some of the claims may be valuable and some less valuable, and others absolutely worthless and bad, it is impossible to determine precisely the price paid for each claim, nor how much consequently should be paid upon retraction (Dutch Consultations, 4, consil. 195, p. 353); (*c*) Nor is retraction allowed when a debt is sold by public auction and knocked down the to highest bidder; (*d*) Nor, lastly, is the right admissable when rent charges (*renten*) and other claims have been purchased at a cheaper rate owing to the calamities of war and other similar troubles, so that the *purchaser runs the risk of total loss*; since it is but just that the advantage which can be derived from the thing sold should go to the person who has the disadvantage, and that the hope of gain should belong to him who has the fear of loss. This opinion, after it had been expressed by certain jurisconsults, was confirmed by a decree of the States of Holland, and it has been specially applied to debts of the provinces and states, *sold in critical times during war* for a smaller sum than their nominal value (Dutch Consultations, 5, consil. 89). In his Compendium, Voet (stating the practice) repeats the same opinion, again relying upon *Lex* 24; but he draws a distinction between debts due by the State, a municipality or a province, and those due by private individuals ["Nam si nomen, quo respublica vel civitas aut provincia obligata est distractum sit, sive pluris, sive minoris quam erat in sorte debita, exigi potest totum debitum, cum in his apud nos negotiationem quandam exerceri constet. Sed si privati debitoris nomen sit venditum minoris quam erat debitum emptor forte non debiti integri sed tantum pretii soluti exactionem est habiturus convenienter jure Romano, nisi debitori oblata sit actio, eodem pretio retrahenda, isque eam oblatam retrahere recusaverit."] Now, it may be admitted at once that if the reasons advanced by the jurisconsults to whom the Judge-President has referred were strained to their fullest extent, they would destroy the *Lex Anastatiana* altogether, for it is difficult to imagine any case in which credit is given to which a certain amount of risk is not

attached. But, whatever the reasons may have been which they advanced in the troublous times of 1648, the Dutch lawyers of later times apparently did not press them beyond the case with which they were then dealing, and they allowed the force of the law to continue in practice at least as to private debts as *Voet* himself tells us." Upon these grounds, JONES, J., held that in the case before the Court the purchaser took the usual and ordinary risks which any and every purchaser of a debt takes, and no more, and that his case did not fall within any of the exceptions existing in the Roman-Dutch law, nor within the reasoning of the Dutch jurists cited by the Judge-President. It was not a case of a purchase of a debt during war, or any similar trouble, nor was this debt of such doubtful character as to fall within the further possible exception to which he had referred, namely, where a doubtful right of action is sold, or a doubtful right of heirship, it being understood that it is only a chance that is sold, the vendor not even being answerable for the existence of a debtor, provided he be acting in good faith (see Voet 18, 4, 9, and Mackeldey).

MAASDORP, J., agreed fully with the view of Mr. Justice JONES, which thus became the judgment of the Court.

The above decision can hardly be considered as reassuring to the commercial world. A majority of the Eastern Districts' Court has decided that the *Lex Anastatiana* is applicable, in other words, that where a person has paid a certain sum for the cession to him of a debt due to another party, he is ordinarily only entitled to recover from the debtor the actual amount he has paid, with interest, unless the debtor has refused to exercise the right of *retraction*; that is, of himself paying the amount which has been offered by the purchaser. It appears, also, from the judgment that the debtor is at liberty (if he has not refused to do so before) to tender the price given by the cessionary for the debt as soon as he is sued for payment. Sir JACOB BARRY was fully justified in his remark that this law must be a very inconvenient one in a mercantile community, and it would certainly be desirable that the suggestion he throws out that, "as creditors have no longer the power over debtors which existed in times past, some amendment of the law is desirable," should be acted upon. It would

hardly be useful to discuss at length the relative merits of the decisions come to respectively by the JUDGE-PRESIDENT on the one hand, and Justice JONES, followed by Justice MAASDORP, on the other. It is proverbially difficult to decide when doctors disagree; and it must, in fairness, be admitted that the jurists upon whose opinions the judgment is based, are themselves sufficiently divided to account for a division of opinion between Judges in the present day. There is, however, enough in the authorities cited in the very careful and learned judgments which have been pronounced, to show that the Dutch Courts did not accept the principle embodied in the *Lex Anastatiana* without some hesitation. In respect of the public *Rentes* (funds) it was rejected as untenable, and it was also held inapplicable to the sale of an entire body of accounts; but a passage from Voet, quoted by Mr. Justice JONES, draws a distinction between debts due from the State and a debt due from a private person, which would make it appear that the rule continued to be applied to the latter. It may, however, be observed that, in the present day, no difference exists between debts due fram a State and those due from a private person, and that it may be argued upon this ground that the distinction upon which JONES and MAASDORP, J.J., relied does not necessarily apply.

But, whatever may be the strictly legal aspect of this somewhat delicate question, there can be no doubt that the reasons which made the Dutch jurisconsults declare in favour of a modification of the *Lex* in respect to the public debt apply with as much, if not more, force in the present day to debts of all kinds; and, as the decision at which the Eastern Districts' Court has arrived stands as the latest expositions of the law on this subject, it would be desirable that a short Legislative enactment should be passed dealing with the matter. People engaged in trade cannot afford either the time or the money to consult a lawyer every time they desire to make a cession of a debt, or other like obligation; and an old *Lex*, which nowadays is certainly rather of antiquarian interest than of practical utility, should not be allowed to remain in force—a pitfall, not merely to the unwary, but one into which the most cautious mercantile men may fall, in matters involving much larger amounts than the comparatively small sum at issue in the case recently decided.

A. C. DULCKEN.

PRO DEO.

At the July Criminal Sessions of the Supreme Court, a prisoner was indicted for murder. The Chief Justice, who presided, allowed the case to be tried in the absence of any Counsel for the accused, who was convicted and sentenced to death. During a discussion on the Estimates this incident was referred to in rather strong language by a member of the House of Assembly, who criticised the Chief Justice for having been guilty of impropriety in allowing a prisoner to be tried for his life undefended. The Attorney-General was at some pains to reconcile the course adopted by the Chief Justice with all that is permissible and appropriate, and even went the length of suggesting that in this particular case, a very seriously-important one we may add, the Chief Justice had, perhaps, purposely refrained from selecting Counsel, in order that public attention might be directed to the necessity for making provision for the appearance of Counsel on behalf of accused persons who are not defended in the usual way. In the discussion, not very happily started, a good deal of talk was indulged in, with the result that neither as to the reason which had actuated the Chief Justice, nor as to what ought to be the rule in such cases, was any one very much the wiser. As to the suggestion that the Chief Justice had not troubled to see that Counsel was provided for the prisoner for the express purpose of starting a discussion on the general question, we must absolutely decline to entertain it. Equally unworthy of serious consideration is the suggestion that a vote should be taken in the Estimates for the defence of prisoners. Unless the members of the Bar are rapidly altering for the worse, we are unwilling to believe that any Barrister would hesitate to comply with a Judge's request, or with the request of the prosecuting Barrister, to defend an impecunious accused person indicted for the crime of murder. Another desperate suggestion was thrown out, viz., that the Chief Justice was utterly unable to make a selection from the large number of Barristers present to defend this particular case. This suggestion is almost as ridiculous as the others. It transpired, in the course of the proceedings in the House of Assembly, that one member of the Bar had waited upon a Law Agent, and intimated his readiness to defend the accused in this case, but that nothing was done owing to

the absence of pecuniary resources. The spectacle of disinterested humanity, in the person of a benevolent Barrister, thus waiting upon a Law Agent to express his readiness to defend a criminal case is one over which it is well to draw a veil. Let us do this exceptional person the credit of recording that, if only means had been forthcoming in the shape of cash, he would have spared no pains to further the ends of justice. The provision of a fund for the defence of accused persons would largely tend to increase the number of philanthropic Barristers of the description stated, and would also greatly increase their individual zeal in disgracing an honourable calling and in developing the enterprise of the tout and common advertiser. We hope no more will be heard of any such benevolent fund. We do not wish to hear in the ranks of the Bar of those who reject the old-established principles which forbid touting, advertising, and debasingly-indirect methods of securing practice at the cost of all that makes practice at the Bar possible to men possessed of the refinement of gentlemen.

As to the case which gives rise to this note, we may regret that, if anything was to be said in the Legislature upon the action adopted by the Chief Justice, some more direct means was not adopted of ascertaining why he adopted the course he did adopt. The practice is clear and we believe well-established. At the same time we believe there is nothing to prevent a Judge taking a trial without the assistance of defending Counsel, whether the indictment be for murder or anything else. The usual practice is for a Judge at the beginning of the session of Circuit or other Court to inquire of prosecuting Counsel whether a murder case is or is not defended. Very frequently the prosecuting Counsel has already secured the services of one of the Bar to act, after having ascertained that the accused had no means of employing legal assistance in the usual way. But the Judge is not subject to any *law*, written or unwritten, on the subject. Instances might be enumerated of cases in which relatives of accused persons have deliberately avoided the expenditure of money in preparing a defence, for the express reason that the "Pro Deo" defence would be forthcoming in a "murder case." It is most undesirable that any hard and fast rule should be laid down on the point.

All that is known of the case under consideration is that the Chief Justice did not suggest that the Court should be helped by

the appearance by one of the *Amici Curiæ* on behalf of the accused. As to why his lordship did not make the suggestion, we know absolutely nothing, and we are perfectly content with remarking that while as a rule it seems better that *bona fide* poor persons indicted for the capital offence, should have Counsel assigned to them, cases can easily be conceived of in which justice *might* be done without the help of a Pro Deo defender.

DIGEST OF CASES.

SUPREME COURT.

Re Arnholz. (April 28).—A provisional order for compulsory sequestration having been granted, the Master appointed a curator *bonis*. Application was now made by the creditors only, the debtor not joining, for leave to sell perishables. Application refused, the sequestration not having been finally adjudicated.

Bate v. Nel. (May 15).—To a writ of execution upon a judgment obtained by plaintiff against the defendant, the Sheriff made the following return: "The goods and chattels of defendant, valued at £25, were duly attached, but were released upon instructions of plaintiff's attorney." *Held*, that this was not such a return as would justify the Court in granting a decree of civil imprisonment against defendant.

Wilson and Hall v. Wessels. (May 16).—The respondent obtained an interdict from the High Court, restraining appellants from trespassing on his farm and searching for diamonds thereon. Appellants contended that a diamond mine had been discovered on the farm, and that upwards of twenty persons were working claims thereon. The mine had not, however, been proclaimed a public digging or mine, and the respondent alleged that appellants were working against his will, he having given the sole right to prospect, with option of purchase, to one Ward. Appeal against the interdict dismissed.

Queen v. Roussouw. (May 19).—Defendant was convicted of the crime of contravening Section 10, of Act No. 20, of 1861, in having transmitted, or caused to be transmitted, a telegraphic message which he knew to be false. The evidence showed that prisoner asked the telegraph clerk to write the message, and paid the fee thereon, but shortly after, and before the message was wholly transmitted, he wished the message stopped, but the clerk said he could not stop it, as it was a rule of the department that a message once handed in should be sent. It was not shown that the accused knew of this rule, and it was not a statutory regulation. On appeal, the question as to the right of any person to recall any telegraphic message handed in by him before its actual transmission, was discussed, but not decided; the appeal being allowed, and conviction quashed on the ground that there was a *locus penitentiæ* open to the accused.

Zahn v. Du Preez. (May 19.)—Plaintiff sued in the Magistrate's Court for the balance of an account "for medical attendance and medicines supplied by the plaintiff to one Miss Du Preez, at the special instance and request of the defendant." The defendant excepted to the summons as being bad and vague, in that it did not allege that the Miss Du Preez was a member of defendant's family, or that he had bound himself for payment. The Magistrate sustained the exception and dismissed the case; but on appeal the Court overruled the exception, and remitted the case for hearing on the merits.

Umfakulu v. Simpkins. (May 20).—In execution of a judgment of the Magistrate's Court, the Messenger attached certain property, which was claimed by plaintiff. The plaintiff did not take out an interpleader summons, but sued the Messenger in a separate action for the restoration of the property. The Magistrate dismissed the case, as the plaintiff had not interpleaded. An appeal allowed, as it was open to the Messenger, when the claim was made, to have reported to the Magistrate and to have obtained the issue of an interpleader summons, which, under Act No. 20, 1856, would have stayed other proceedings, but his not having done so did not bar the plaintiff taking the proceedings he had done.

Queen v. Arends. (May 20).—On an indictment for incest the jury found specially that the accused had had carnal intercourse with his own illegitimate daughter. The Circuit Judge entered a verdict of guilty, but reserved the point whether this amounted to the crime of "incest," which was defined by Van der Linden as the carnal connection of persons whose marriages with each other are forbidden by law. On appeal, conviction sustained (*Vide* Voet, 23, 2, 35).

Queen v. Logan. (May 22).—The accused held a railway restaurant licence authorising him to sell liquors on any day, within a reasonable time before and after the departure of any train, and at no other time. Accused sold liquors on Sundays to persons not actually travelling by train, and was convicted under the Liquor Act. On appeal, conviction affirmed.

Shakofsco v. Van Noorden. (May 27).—The plaintiff, a cigarette-maker, earning 10s. a day, applied for leave to sue *in formâ pauperis* for an account of an alleged partnership with defendant. *Held*, that it was impossible to lay down any hard and fast rule, but that each case must be decided on its own merits. Leave in this case refused.

Nel v. Nel's Executrix. (May 28.)—Testators by mutual will specifically bequeathed their farm S. to certain children, and their farm S.H. to certain grandchildren (children of a predeceased child). The will then provided as follows: "The above farms, after the death of the testators, to become the property of the children and grandchildren as laid down above, under the express limitation, however, that their above-mentioned heirs shall not have the right to sell their respective shares in the above-mentioned farms, or to alienate them in any other manner, but that the same shall pass over to their children and descendants as *fidei commissary* inheritances." *Held*, that as a prohibition of alienation must be construed strictly according to the words, and is not to be extended from one generation to another (Grotius 2, 20, 11), the prohibition here was only upon the children and grandchildren named as the heirs in the will.

Brown v. Green. (May 28.)—An insolvent and his trustee joined as plaintiffs to sue the defendant to enforce an agreement made before insolvency for the re-transfer of certain leases of Crown Lands. Defendant excepted to the insolvent suing, as no longer having any vested right; but *Held*, that as the trustee was before the Court, there was no objection to the insolvent joining as co-plaintiff, he being interested in the residue of the estate.

Worcester Municipality v. Colonial Government. (May 29).—The Government agreed to transfer to the Municipality, upon payment of the sum of £671, the "remaining portions" of certain two farms upon which the town of Worcester was founded. Certain erven and other lands had been sold and transferred. The Government had built a Drostdy, valued at from £2,000 to £2,500, gaols, railway stations, and other buildings, but the land on which these buildings had been erected had never been marked off on the original transfer. The Municipality sued for transfer of the whole remaining extent, including these buildings, while the Government tendered transfer of the remaining extent, excluding them. Absolution from the instance granted.

Combrink v. Myburgh. (June 2-5).—Damages awarded for injury done to plaintiff's farm from a fire which had been kindled by defendant on his own farm, and which had spread to plaintiff's land.

De Klerk v. Marais. (June 4.)—Under the Divisional Councils' Act, No. 40, 1889, the Council may proceed for the recovery of any rates levied, against either the owner or lessee or occupier, or both of them in any one action, but in the absence of agreement the owner to be liable to the lessee for any rates paid by him. By the 18th Section of the Act an elector shall not be entitled to vote who shall have not paid all sums due from him in respect of any rates made payable three months before the day of voting. The owner of certain property had not paid the rates levied thereon. *Held*, that the lessees of such property were not entitled to vote in respect thereof until the rates had been paid thereon. [SMITH, J., *diss.*]

Liquidators Paarl Bank v. Roux's Heirs. (June 8.)—The late Roux held shares in the Paarl Bank, which were still registered in his name and held by his estate. After Roux's death his executrix (who was his widow and also one of his heirs under the will) administered the estate and paid out the heirs, taking over the whole of the assets, including the shares, but which, however, she never transferred to herself. The Bank having been placed under liquidation and a call made on the shares, the Liquidators sued both the widow and the heirs, to bring back into the estate the amounts paid out. The heirs excepted that the Liquidators had no cause of action against them, there being no privity between them, but the exception was overruled. A plea of prescription, however, as far as the heirs were concerned, was upheld, they having been paid out more than eight years before the stoppage of the Bank. Judgment given against the executrix and widow, who had been married in community with deceased.

Honeyborne's Executors v. Honeyborne's Executors. (June 9.)—D. by last will bequeathed his estate to his children, but by subsequent codicil he directed that his daughter's, Mrs. Honeyborne's, share should "be burdened with a *fidei commissum* in favour of her children K. E. and J., with the intent that my daughter shall have the uncontrolled use of the money and property bequeathed to her during her life, but that so much thereof as shall remain at her death shall pass to her said children in equal shares." £1,000 of the inheritance was specially appropriated to paying a mortgage bond on property coming to the children, and was not mixed with Mrs. Honeyborne's estate. Mrs. Honeyborne, during her lifetime, was a shareholder in the Union Bank, and she died shortly after the Bank was placed under liquidation. Her executor-testamentary refusing to act, the liquidators were appointed executors-dative, and now sued for the recovery of this £1,000. The defendant was the executor-testamentary of the joint estate of the late Mr. and Mrs. Honeyborne, and claimed the money under D.'s codicil for Mrs. Honeyborne's children. *Held*, that the plaintiffs are entitled to receive and administer the money as Mrs. Honeyborne's executors, though probably the children would be ultimately entitled to the money out of her estate.

Dutch Reformed Church of Aliwal North v. Green. (June 12).—Defendant leased land from the plaintiffs for a term of years at an annual rental. Defendant put buildings on the land and otherwise greatly improved the same. During the currency of the lease there was a considerable fall in the value of the property, and the plaintiffs agreed to reduce the rent "for an indefinite period." After receiving rent for a year at the reduced rate, the plaintiffs gave notice that they would revert to the original agreement. Defendant contended that the reduced rent only was payable during the unexpired term of the lease, but *Held*, that plaintiffs were entitled to terminate the "indefinite period" at their own option, the reduction being a mere act of grace on their part.

Wilson v. Wilson and Minnaar. (June 12.)—The plaintiff, the husband, sued the first defendant, his wife, for divorce for adultery, and the second defen-

dant for damages as co-respondent. Counter-charges were brought against plaintiff. Adultery was proved on both sides. The case was dismissed as against the wife, and nominal damages without costs given against the co-respondent.

Miller v. Richmond Licensing Court. (June 12.)—A storekeeper near a railway station had for some years held a retail wine and spirit licence. He sold his property to appellant, who obtained a temporary transfer of the licence. At the next sitting of the Licensing Court appellant applied for a licence in the ordinary way. Objections were raised by the inhabitants in the neighbourhood, on the ground that the premises were far removed from police supervision, and that the sale of liquors at that place led to drunkenness and disorder. The Licensing Board treated appellant as a new applicant under Section 58 of the Licensing Act, and refused the licence. An appeal against this refusal dismissed.

Walker v. Liquidators Cape Central Railway. (June 17.)—In taxing the costs as between party and party, the taxing officer reduced counsel's fees to both senior and junior counsel from one hundred guineas and seventy guineas to fifty guineas and thirty-five guineas. Plaintiff now appealed, urging that the briefs on the other side were marked at the same fees, and that the amount paid was necessary to induce leading counsel to take the briefs in the case, which was of a very complicated nature. The Court refused to interfere, as there did not appear to be any grave mistake on the part of the taxing officer in the exercise of the discretion he was bound to use.

Liquidators Cape of Good Hope Bank v. Twentyman. (June 17.)—Respondent had sold certain shares in the Bank to one H. about four months before the Bank stopped. H.'s estate had since been sequestrated, and only a small amount recovered therefrom against the calls made upon the shares. Respondent was now placed on the list of contributories in respect of the said shares for the amount of calls unpaid.

Liquidators Cape of Good Hope Bank v. Whitton. (June 17.)—Respondent had sold his shares in the Bank and transfer was made of them less than two years before the Bank's stoppage, but more than two years before this application to have respondent placed on the list of contributories in respect of the unpaid calls due thereon. *Held*, that the period of respondent's liability had expired.

Re Viljoen. (June 18).—By mutual will husband and wife had devised a farm to their children. The wife died and the children took possession of the property, but the transfer remained registered in the husband's name. The husband subsequently became insolvent, and his trustee now demanded from him the title deeds of the property. The insolvent refused to give up the titles unless the trustee undertook to acknowledge the children's right to the property. The trustee insisted on unconditional delivery of the titles. Delivery of the titles ordered, leaving it to the insolvent or legal guardian of the children to move in case the trustee should attempt to act improperly.

Queen v. Gilliome. (June 18.)—The accused was convicted under the 2nd Section of the Animal Diseases Act No. 2, 1881, in having refused to isolate or destroy a certain horse, after direction to that effect given by the Board of Inspection acting under the Act. On appeal, conviction quashed, as under the Section in question the Board had power themselves to destroy or isolate an animal suspected of having a contagious disease, but could not compel the owner of the animal to do so.

Teengs v. Garlick. (June 18).—In a bill of costs as between party and party, the taxing officer disallowed the fees for a junior counsel, and also for a consultation. An appeal against this taxation was lead, and it was contended that the items which had been taxed off had been usually allowed. The taxing officer showed there were special circumstances which had induced him to strike off the

items. The Court refused to interfere with the exercise of the taxing officer's discretion.

Coronel and another v. Ward and Wessels. (June 19).—These were actions for a declaration of rights as to certain agreements respecting the prospecting for diamonds, and the purchase of the farm whereon they were discovered. The defendant Wessels had granted certain rights to defendant Ward, his order and assigns. Ward had assigned certain of his share to plaintiffs. Plaintiff Coronel had again ceded his rights to the liquidators of the Cape of Good Hope Bank. Defendant Wessels excepted that plaintiffs had no right of action against him, but the exception was overruled. There was a further exception to Coronel suing after the cession of his rights. This was allowed, and defect cured by the liquidators joining as co-plaintiffs.

Lischky v. Strangman. (June 19).—The plaintiff, a general dealer (but not a broker or agent) sued defendant, a miller, in the Magistrate's Court, for £5 upon the sale of a horse. It appeared that defendant had said to plaintiff that he would give him a commission if he got a purchaser for a stallion of his at £120. Plaintiff introduced a farmer to defendant, who, however, refused to give the amount asked. Some five weeks after, the defendant sold the horse to the farmer for £100. The Magistrate found that the subsequent sale had been effected entirely by the parties themselves, and that plaintiff had nothing to do with it, and gave judgment for defendant. Appeal from this judgment dismissed, there being no contract to pay commission on this sale, nor any implied contract as might possibly have subsisted in the case of a custom introduced by a broker or agent.

Boonzaier v. Castens. (June 19).—Defendant was sued in the Magistrate's Court for damages for defamation, in having imputed to plaintiff that she had had an illegitimate child. The Magistrate gave judgment for defendant, on the ground that no special damage had been proved; but an appeal againt this decision was allowed, and judgment entered for £5 (by consent), damages and costs.

Watson's Executors v. Watson. (June 23). One of two of the executors testamentary of Watson's estate applied for leave to compel the other executor to join him in suing the heirs to compel a refund of money paid out, so as to meet calls made upon shares in the Union Bank held by the estate. The second executor was also one of the heirs, and objected to sue. Under the circumstances the Court allowed the executor to bring the action in the name of the estate, joining the co-executor as a defendant.

Coronel and others v. Ward and Wessels. (June 23-26).—Cessionaries of portion of a concession of prospecting rights, &c., declared entitled to share in the benefit of a further agreement obtained by the cedent, arising out of, and subsequent to, the original contract.

EASTERN DISTRICTS' COURT.

Reg. v. Vice. (April 13th).—Where defendant was summoned for trespass, and it appeared that he should properly have been charged with contravening Act 23 of 1879, by being on the land without consent of the owner: *Held*, that the omission to set this out in the summons rendered the proceedings bad.

Reg. v. Lenz. (April 13th).—D. Lenz and F. Lenz were both summoned by a R. M. on a charge of assault "upon two persons," and on the same day D. Lenz was summoned for assaulting the police. It appearing that the second charge was founded upon the same acts as those on which the first charge was based, the latter proceedings were quashed.

Trustees of Insolvent Estate of B. Arnold & Co. (April 13th).—Costs of an *ex parte* application by an outside party for attachment of certain property

were allowed with consent of Trustee out of insolvent estate, the estate having benefitted by obtaining that asset.

Re Balderson's Trust. (April 13th).—A Trustee being discharged on the trust having lapsed, and leave granted to the widow in whom the property vested by the husband's will, to sell, and it being found impossible to sell, but possible to mortgage, the property—a subsequent application for leave to mortgage was refused as unnecessary and likely to lead to needless and repeated applications.

Ryall King & Co. v. Dodd. (April 13th).—Advertising edictal summons once in the *Government Gazette* (in addition to local papers) held sufficient according to the Rule, though hitherto the custom had prevailed of inserting such advertisement twice. [On May 15th the like order was made *re Trustees of Merriman.*]

Nguma v. Quta. (April 13th).—An appeal in a native case being set down for hearing on a certain day, and the plaintiff (respondent) having meantime died, the case was postponed *sine die*; notice to be served on the "legal representative of the plaintiff."

Gerd's Estate. (April 20th).—A bankruptcy having ensued within two years of the execution of an ante-nuptial contract, and the contract being challenged under Act 21 of 1875 as being made with intent to defeat and delay creditors under §§ 3 and 4: *Held* (by JONES, J.), that under those sections the Court has to find the intent with which the contract was executed, and that to do so, all the surrounding circumstances existing at the time the act was done must be considered.

Jantje Tyotsyo v. J. W. Gray. (May 15th).—A defendant was absolved from the instance in a charge brought under § 200 of the Transkei Penal Code, but was not awarded costs: *Held*, that the Magistrate exercised his discretion rightly, but that he should also have awarded costs.

Reg. v. Adam. (May 19th).—Appeal from the decision of the R.M., Grahamstown, in which defendant had been found guilty of contravening § 75 of Act 28 of 1883, by unlawfully selling certain intoxicating liquors without having a licence to do so, and was fined £12 10s., and the liquor found on the premises was confiscated under § 83. The ground of appeal was that the liquor and vessels seized did not belong to accused, and were not on the premises for purpose of sale: *Held*, that in order to draw this inference the Court must be shown the object with which the liquor was there; and, this not having been done, the appeal was dismissed.

Deschamps v. Van Onselin. (June 11th).—This case involved the question of the applicability of the *lex Anastatiana* (Cod 4, 35, 22) to a debt of £100 ceded to plaintiff for £38. The matter came before the Circuit Court at Port Elizabeth, and it was there agreed it should be removed thence to the E.D. Court for argument on the above-named point, that is, whether the plaintiff was entitled to claim the full £100, or had only a claim according to the *lex Anastatiana* for the sum of £38, which he had paid for the cession of the debt to him. The JUDGE PRESIDENT held that the *lex* did not apply to the case, but JONES, J., and MAASDORP, J., were of contrary opinion, and judgment was consequently entered only for £38, the amount given by the purchaser to whom the debt had been ceded.

Kobani v. Matyoro. (May 29th).—On appeal from a judgment of the R.M. of Tsolo, in a case in which appellant was sued for return of cattle paid by respondent as "dowry" for appellant's daughter, it was held that the Eastern Districts' Court can hear appeals in cases involving native laws and customs, and that native marriages in the Transkei are not declared to be unrecognisable by the E. D. Court in consequence of its decision in *Malgas v. Gakawu.*

Reg. v. Wildskut and Dirk Minnie. (May 29th).—*Cattle Stealing.*—In respect to this case, forwarded to him as one of the Judges of the E. D. Court for review, JONES, J., observed that this Court has often held that where it is intended to use the presumption of law created by § 2 of Act 19 of 1884, against a person in whose possession a carcase may be found, the prisoner must be charged with the theft

in the ordinary way. In this case, prisoner was merely charged with "conveying away the carcase of a slaughtered sheep belonging to some person or persons unknown." The charge was bad, as it did not even set out the requirement of the Act, namely, that the accused was unable to give a satisfactory account of such possession. Ordered that the charge be quashed as well as subsequent proceedings, but prisoners might be charged again with theft of a sheep, or carcase of a sheep.

Bessenger v. Dyan, Umhale and Mosequ. (May 29th).—This case came up on appeal against an exception taken in a case before the R. M. at St. Mark's, in which plaintiff claimed £100 as damages for trespass, to the effect that the summons did not shew whether defendants were liable collectively or severally. JONES, J., observed that in an action of tort of this kind judgment may be given against any one defendant for the amount claimed; and the Court allowed the appeal against the exception, remitting the case for further hearing.

Kyte v. McLeod. (June 2nd).—Appeal from decision of R. M. of Albany in a case in which Kyte sued McLeod for £2 5s. for sawing certain timber. The Magistrate had found that plaintiff had agreed to saw a certain lot, and had not completed his contract. The Magistrate had awarded £1 19s. on the work so far done, finding there had been a promise to pay that amount, and that it was customary to pay sawyers weekly. It appearing, however, from the Record that the promise to pay £1 19s. was only made on the supposition that plaintiff was going on with the job, the appeal was allowed.

Lauck v. Dunning. (June 2nd).—*Held*, on an application to set aside a writ of arrest, that a statement by the applicant (Dunning), against whom an action was being brought by respondent, to the effect that he "would be in England in six weeks," was sufficient ground for declaration in the affidavit upon which the writ was granted that he was "about to remove, or was making preparations to remove" from the Colony.

Goldschmidt v. English (June 5th).—Defendant having purchased from plaintiff 1,000 poles of a certain length and thickness, to be selected by defendant out of 10 of 32 stacks, chose 10 stacks and accepted 885 poles from them, but declined to pay on the ground that he had not received the remaining 115 poles. Action was brought by plaintiff for £75, the value of 1,000 poles, and he alleged that he had offered and was prepared to deliver the remaining 115 poles; and defendant, on the ground of non-completion of contract, also brought an action in reconvention for specific performance of the contract by delivery of the remaining 115 poles. *Held*, that the plaintiff should have selected from the 10 stacks such poles as answered the guarantee; and that specific performance could not be ordered as to the remaining 115 poles. The plaintiff having failed to fulfil this duty, and defendant having proffered the 115 poles, judgment was entered for plaintiff for £69 5s. and costs, or £75 and costs on delivery of the 115 poles; MAASDORP, J., however, holding that the judgment should also set forth that there was absolution from the instance, with costs, on the claim in reconvention.

Lapworth v. Lapworth.—In this case divorce was granted on proof of adultery "with certain person or persons unknown," the evidence showing that defendant (who did not appear) had been found living in a brothel and in the company of persons well known to the police as bad characters.

NOTES.

The case, recently tried in London, of *Cleaver et al* v. *Mutual Reserve Fund Insurance Association* raised an interesting question on a policy of life insurance for £2,000 on the life of the late Mr.

James Maybrick, whose wife was convicted of having caused his death by poison. The insurance had been effected in the name of Mrs. Maybrick, now convict, and the will of her deceased husband secured to her the full benefit of the insurance. The question thus raised was whether the convicted wife could be held entitled to reap the benefit of the crime she had committed. Counsel for plaintiffs (the assignees) argued that the defendant Company had no right to be relieved of their liability on an express contract; that the Company was liable, having accepted risk of the death of the assured by murder, that the assured had done no wrongful act such as committing suicide or engaging in a duel, the only two risks not undertaken by the Company; and that the fact of Mrs. Maybrick having committed the murder did not alter the insurers' liability. It is not surprising that, on grounds of public policy the Court (DENMAN and WILLS, J. J.) gave judgment in favour of the defendants. Their Lordships pointed out that the plaintiffs could not occupy a better position than the party herself and that position precluded her from securing the amount of the insurance on the life of the husband she had murdered. If ever there was a case in which a party was estopped by her own wrong, it must be this one, otherwise the doctrine of estoppel might just as well be abolished. Besides this, there is, it might be argued, the further question of fraud which would vitiate the contract. In any case there remains one very substantial objection to any other result to a claim of this character, viz., the tendency to encourage fraud in connection with policies of life insurance of a character most difficult to detect.

At the date of going to press, it is announced that the Government has "arranged" with Mr. Justice COLE, and that the learned Judge will accordingly retire at the end of next month. His successor is not yet announced.

EXAMINATION LISTS.

FINAL LL.B.

1. Longden, Herbert T., B.A., Pearston.

(3 candidates examined.)

PRELIMINARY LL.B.

1. Kayser, J. B., B.A., Capetown.
2. Buchanan, W. P., B.A., Capetown.
3. Spencer, H., B.A., Capetown.
4. McFadgen, W. A., B.A., Graaff-Reinet.

(6 candidates examined.)

LAW CERTIFICATE.

1. Kannemeyer, D. V., Burghersdorp.
2. Van Zyl, J. P., Burghersdorp.
3. MacWilliams, T. W., Kingwilliamstown.
4. Cluver, P. D., Capetown.
5. Hunt, C. A., Kingwilliamstown
6. Sonnenberg, H. J., Capetown.
7. Nel, G. P., Capetown.
8. Herold, C. W., Capetown.
9. Coyte, H. D., Grahamstown.
10. Wege, P. A., Capetown.
11. Truter, C. J., Capetown.

(21 candidates examined.)

CIVIL SERVICE LAW.

1. Lyne, M. J., Uitenhage.
2. Shaw, F., Kimberley.
3. Van der Riet, F. J. W., Capetown.
4. Brand, F. J. G., Capetown.
5. Leslie, D. D., Sunderland.
6. Giddy, E. W. R., Prince Albert.
7. Lloyd, R. C., Capetown.
8. Brinkman, L. H., Carnarvon.
9. Smith, P. G., Capetown.
10. Lawrence, F. J., Capetown.
11. Fichat, S. C., Kimberley.
12. Osler, S. H., Burghersdorp.

(35 candidates examined,)

THE CIRCUIT LISTS.

The following Circuit Lists have been published :—

WESTERN CIRCUIT.

The Hon. the Chief Justice, SIR J. H. DE VILLIERS, K.C.M.G.
Registrar: Percy De Villiers.

Swellendam, Thursday, 17th Sept.
Riversdale, Monday, 21st Sept.
Mossel Bay, Thursday, 24th Sept.
George, Saturday, 26th Sept.
Oudtshoorn, Tuesday, 29th Sept.
Prince Albert, Friday, 2nd Oct.
Beaufort West, Monday, 5th Oct.
Worcester, Thursday, 8th Oct.
Malmesbury, Wed., 14th Oct.

NORTHERN CIRCUIT.

The Hon. Mr. Justice LAURENCE, Judge-President High Court.
Registrar: H. Burton.

Hopetown, Monday, 21st Sept.
Richmond, Wednesday, 23rd Sept.
Victoria West, Friday, 25th Sept.
Colesberg, Monday, 28th Sept.
Middelburg, Thursday, 1st Oct.
Cradock, Saturday, 3rd October.
Somerset East, Wed., 7th Oct.
Graaff-Reinet, Tuesday, 13th Oct.

EASTERN CIRCUIT.

The Hon. Mr. Justice MAASDORP.

Registrar: F. A. Hutton.

Uitenhage, Wednesday, 2nd Sept.
Port Elizabeth, Friday, 4th Sept.
Bedford, Monday, 14th Sept.
Fort Beaufort, Wed., 16th Sept.
Kingwilliamstown, Sat., 19th Sept.
East London, Thursday, 24th Sept.
Cathcart, Saturday, 26th Sept.
Queenstown, Tuesday, 29th Sept.
Burghersdorp, Saturday, 3rd Oct.
Aliwal North, Wed., 7th Oct.
Dordrecht, Monday, 12th Oct.
Cala, Thursday, 15th October.
Butterworth, Tuesday, 20th Oct.
Umtata, Monday, 26th October.
Kokstad, Monday, 2nd November.

BUSINESS IN THE SUPERIOR COURTS.

In the year 1890, business was disposed of in the several superior Courts and on the Circuits as follows:—

	Indictments.	*Civil Cases.*
Supreme Court	87	922
Western Circuit	94	9
Eastern Districts' Court	26	212
Eastern Circuit, including the Transkeian Courts	328	37
High Court, Griqualand	99	332

According to the *Statistical Register*, from which these figures are taken, the civil cases are made up as follows:—

	Illiquid.	*Other.*	*Total.*
Supreme Court	147	775	922
Western Circuit..	7	2	9
Eastern Districts'	54	158	212
Eastern Circuit	29	8	37
High Court, Griqualand	89	243	332

CONTENTS OF EXCHANGES.

The Law Quarterly Review. Vol. VII, No. 27, for July, 1891. London: Stevens and Sons, Limited.

Notes—Recent Cases—Vagliano's Case—Title to Chattels by Possession—Marital Authority—The Waste of Judicial Power—The Legal Restrictions on Gifts to Charity—Reviews and Notices—Contents of Exchanges.

The Journal of Jurisprudence and Scottish Law Magazine. Vol XXXV, Nos. 413, 414 and 415, for May, June and July, 1891. Edinburgh: T. & T. Clark.

No. 413. Editorial—Criminal Administration under the Cæsars—The Dishorning of Cattle—Obituary—The Month—Reviews—English Decisions—Sheriff Court Reports.

No. 414. Editorial—The Taxation of Feu-Duties—The Sumptuary Laws of Scotland—The Fate of the Postponed Fiar—Obituary—The Month—Reviews—English Decisions.

No. 415. Editorial—The State of Business in the Court of Session: The Abuse of the Adjustment Roll—The Evidence of Spouses in Criminal Cases—The Criminal Jurisdiction of the Sheriff—A Legal View of the Ordinance on Graduation in Arts—Appointments—Obituary—The Month—Reviews—English Decisions—Sheriff Court Reports.

The Indian Jurist. Vol. XV, No. 3. Madras: Vest and Company.

Scintilla Juris—Nemo potest exuere patriam—The Arbitration Court at Madras—The Gains of Learning Bill—Judge-made Law—The Testimony of an Accomplice—Negotiable Instruments and Acceptances—The Training of Civilians—Reviews—Correspondence—Privy Council Cases—House of Lords—Kistna Case—Pennsylvania Case—New York Case—Notes of English Cases—Notes of Indian Cases.

The Canada Law Journal. Vol. 27, Nos. 6, 7, 8, 9, 10 and 11, for April, May and June, 1891. Toronto: The J. E. Bryant Co., Limited.

No. 6. Editorial—Notes on Exchanges and Legal Scrap Book—Reviews and Notices of Books—Correspondence—Diary for April—Early Notes of Canadian Cases.

No. 7. Editorial—Notes on Exchanges and Legal Scrap Book—Diary for April—Early Notes of Canadian Cases—Osgoode Hall Library—Law Society of Upper Canada.

No. 8. Editorial—Notes on Exchanges and Legal Scrap Book—Correspondence—Diary for May—Early Notes of Canadian Cases—Appointments to Office—Law Students' Department—Flotsam and Jetsam—Law Society of Upper Canada.

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Die Ideale im Recht, J Kohler—*Die privatrechtlichen körperschaften im entwurf eines Bürgerlichen Gesetzbuchs für das Deutche Reich*, Justizrath Lesse—*Das gesetzliche Pfandrecht und das Pfandungspfandrecht nach dem entwurfe eines Bürgerlichen Gesetzbuchs fur das Deutche Reich, unter Berücksichligungdes preuszischen Rechts*, Dr. Adam Kiewicz—*Zur Frage der Vergütung Nichtokonomischen Schadens aus Delikten—Zugleich ein Beitrag zur kritik des entwurfs eines Burgerlichen Gesetzbuchs für das Deutche Reich*, Dr. Seng—*Literatuur.*

We have also received, and acknowledge with thanks, the following:—

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CAPE LAW JOURNAL.

THE THEORY OF THE JUDICIAL PRACTICE.

CHAPTER XX.

PART I.—APPEALS *(Continued.)*

h.—From the Supreme Court to the Privy Council.

Appeals from the British Colonies can only be to the Privy Council direct, and to no other tribunal; though appeals in Great Britain and Ireland can go first to the Special Court of Appeal and further to the House of Lords.

No appeals from the Colonies can go to the House of Lords.

No appeal from this Colony can go to the Privy Council except an appeal from the Supreme, or Appeal Court here.

The Supreme Court is now also the Colonial Court of Appeal.

In order to appeal from the Supreme Court to the Privy Council from any final judgment, the amount in dispute, or the matter at issue, should be above the value of £500, or, in case the judgment involves a question of property, or any civil right amounting to, or of the value, of £500 (§ 50, Charter of Justice, and § 20 of Act 5 of 1879).

For the purpose of deciding whether there is a right of appeal, the sum or matter at issue must be ascertained by reference to the pleadings, and not from the circumstances of the case as disclosed at the trial, and the point to be ascertained is, is the amount claimed upwards of £500.

Thus, where a person sued for £500 damages for breach of contract and was awarded only £100, the Court held that, though the amount demanded, and not the amount obtained, is the test as to the £500 value, yet that, in order to entitle the appellant to appeal, he must come within the 50th § of the Charter of Justice,

and that the amount at issue in this case was really not £500. (*Roebuck* v. *Murdoch*, 1 Juta 41).

On the other hand, an appeal to the Privy Council has been allowed in an action for £25 damages, a perpetual interdict and a declaration of rights, the rights in question being of the value of £500 (*De Villiers* v. *The Cape Divisional Council*, Buch. Rep. for 1875, p. 125).

In estimating the principal amount, the interest may be included (*Laforet* v. *Nourse*, 1 Menz., 497); but the amount of the costs cannot be taken into consideration in estimating the appealable amount (*Norden* v. *Opperheim*, 3 Menz., 409). So, also, claims in convention and in reconvention, and the judgment given thereon, must be held as distinct and separate claims and judgment, and the amount decided on one of the claims cannot be taken into computation with the amount decided on the other claim in order to enable a defendant to appeal on both judgments. So, also, only the amount of the balance sued for, and not the original amount of the debt, can be taken into computation in fixing the appealable amount (*Marthyse* v. *Van Reenen*, 3 Menz., 457); and an appeal will be refused until after definite accounting has taken place between the parties (*Still* v. *Norton*, 2 Menz., 211).

The party wishing to appeal must, within 14 days after the final judgment, lodge with the Registrar of the Supreme Court a petition for leave to appeal to the Privy Council, and give notice thereof to his opponent (Rule of Court 37), and he must also within the same period apply, on the petition, to the Supreme Court for leave to appeal from the said judgment (§ 50, Charter of Justice).

When leave to appeal has been obtained, the appellant must within three months thereafter, enter into recognisance with the respondent, together with two other persons as sureties, to be approved of by a Judge for the due prosecution of the appeal and for the costs as may be awarded thereon (Rules of Court 38, 40 and § 50 of the Charter of Justice). The Rule of Court requiring recognisances to prosecute an appeal to the Privy Council, to be entered into within three months is imperative, and when no such recognisance is entered into, the leave to appeal will be recalled (*Paterson* v. *Umzinto Sugar Company*, Buch. for 1879 p. 90). So also where

the required security has not been given within three months from the time when leave to appeal has been granted, the order for leave to appeal was discharged (*Montmort* v. *Board of Executors*, 4 Juta, 61 and *Heydenrych* v. *Kingon*, 7 Juta, 144); and also where the petition for leave to appeal was lodged, but appellant had not entered into recognisances to prosecute the appeal within three months, the appeal was disallowed (*Forbes & Co.* v. *Sutherland*, 2 Searle 275).

But, of course, though the Supreme, or Appeal, Court should refuse to allow an appeal, or discharge an appeal not duly prosecuted within the time prescribed, the Privy Council has retained to itself, and frequently exercises, the power of granting an appeal where the lower Court would, or could, not do it, (§ 51, Charter of Justice; *in re Colenso, Bishop of Natal*, 3 P.C. (N.S.) 115; and McPherson's Practice of the Privy Council, pp. 19-52); and a respondent's objection, before the Privy Council, as to the competency of the appeal, on the ground that the subject-matter of the suit did not involve the prescribed appealable value, should be made, not during the hearing of the appeal, but previously by motion for a discharge of the appeal (*Aldridge* v. *Cato*, 9 Privy Council Reports (N.S.). 70).

But, pending the Appeal to the Privy Council, no writ of execution can be issued without the leave of the Supreme Court, and the Court may, on granting leave to appeal, order, also, that, pending such appeal, the judgment shall either be carried into execution or that the execution thereof shall be suspended as to the Court in either case appears to be most consistent with real and substantial justice; and thereupon the party, whether appellant or respondent, according to the circumstances of the case, must enter into good and sufficient security, to be approved of by the Supreme Court, or a Judge, for the due performance of such judgment as the Privy Council shall think fit to deliver thereon (§ 50 of the Charter of Justice, and Rules 39 and 40; and *Brunette and others* v. *Stanford*, 3 Searle, 221). But where a writ of execution has been issued, without leave of the Court, between the date of the judgment and the filing of the petition for leave to appeal, the writ was set aside with costs (*Benning* v. *Thomas*, 8 *Buch.* 47).

Instead of the whole, the Court may order a part of the judgment to be carried into execution; thus, for instance, the judgment for costs was ordered to be carried into execution, on the respondent giving security *de restituendo*, if the Privy Council should alter the judgment (*Thwaits* v. *Executors Anderson* 3 *Searle*, 200).

No appeal can be had from a civil trial by a jury, but in case of a misdirection of the Judge, or the verdict is against the weight of evidence given, then a fresh trial may be had (§ 34 of Act 7 of 1854, and Rule of Court 234).

But when once the Court has given judgment on the finding of the jury (§ 39) an appeal may be had to the Privy Council on a *point of law only* (§ 40).

As a rule no appeal can be had in a criminal case from a Colony to the Privy Council, nor has the Supreme Court here the power to grant such leave to appeal, but on application to the Privy Council such appeals have been allowed for very weighty and special reasons. For instance, in the case of the *Queen* v. *Bertrand* (tried in 1867), which was an appeal from New South Wales, the Privy Council allowed the appeal because there were circumstances which raised questions of great and general importance in the administration of justice, where it would be proper for the Judicial Committee of the Privy Council to advise the allowance of such an appeal. . . . with a view not only to ensure, as far as may be, the due administration of justice in an individual case, but also to preserve generally the due course of procedure (4 Privy Council Reports (N.S.), 461).

So also in the case of *Dinizulu* v. *The Attorney-General of Zululand.* The Privy Council decided (July 30 1889) that leave to appeal will be given only in a cause where there has been *a departure from the principles of natural justice*, but not on the ground of a violation of a technical rule of procedure or for an error in the form of an indictment or information (*Law Times*, Vol. 61, p. 740).

As soon as security has been duly given for the prosecution of a civil appeal, a transcript of the record must be sent by the Registrar of the Supreme Court to the Registrar of the Privy Council, together with the reasons (in original) given by the

Judges for or against such judgment. The record may be printed either here or in England; and effectual steps must immediately thereafter be taken by the Attorneys for the appellant to set down the appeal for hearing within a period not exceeding 12 months from the date of the arrival in England of the copy record (§51, Charter of Justice, and Privy Council Rules, in Tennant's Rules of Court, Edition 3, pp. 223-231.)

The Judicial Committee of the Privy Council never give a formal judgment in any appeal cases. They merely report their reasons to, and advise Her Majesty as to what the judgment should be. The formal order is drawn up and signed by Her Majesty in Council. The Crown has retained the prerogative right of making any order, in any appeal case, as may seem just and reasonable; and may remit to the Court appealed from the whole, or any part, of a case for further evidence, or information, or trial; and may also empower the Court below to decide upon such additional evidence (McPherson's Practice of the Privy Council, pp. 124, 125; and *Hiddingh* v. *De Villiers and others*, 5 Juta, 298).

On any final judgment of the Privy Council, on an appeal from this Colony, execution must be sued out of the Supreme Court in like manner as an ordinary judgment of that Court (§ 52, Charter of Justice).

CHAPTER XXI.

Review.

Under this heading are not included, though sometimes called *review*, certain sentences of the Magistrates which, under the 47th Section of Act 20 of 1856, and Section 2 of Act 10 of 1865, must be remitted to a Judge for his consideration and certificate as to the real and substantial justice of the proceedings. But the review of certain proceedings of the lower Courts on certain grounds, and for which otherwise no right of appeal is given. For instance, by the 4th Section of Ord. No. 40 of 1828, full power, jurisdiction and authority are given to the Supreme Court to review the proceedings of all inferior Courts of Justice within the Colony, and if necessary to set aside or correct the same.

This language of the Ordinance is repeated in the 32nd Section of the Charter of Justice, which was granted several years thereafter. But the preamble of the Charter extends this power to the several "territories and settlements dependent thereupon" (that is upon the Colony), and the Supreme Court has frequently entertained and decided upon reviews from several of the *dependencies* of the Colony (*Devitt* v. *The High Sheriff*, 1 Juta, 412). But they cannot review a cause tried beyond the Colony for an offence committed out of the Colony (*Queen* v. *Ellingwood*, Buch. for 1879, p. 212). Again, both the Ordinance and the Charter of Justice contemplate the review to be only by the Supreme Court, but this right can be exercised now also by the E. D. Court, the High Court of Griqualand West, and the several Circuit Courts, but only within their respective jurisdictions (Rule of Court 190; and *Queen* v. *Williams and Holliday*, 1 Buch. App., 277). But the Supreme Court only (none of the other Courts) have the right to hear reviews from the *dependencies*, and, of course, can entertain reviews direct from all parts of the Colony; and so also the Supreme Court (and none others) has the power to review certain criminal cases from the Consular Courts in Africa to be established by virtue of Her Majesty's Order in Council, called the African Order in Council, 1889.

If any question should arise on review of judgment of any inferior Court in a criminal action, before the E. D. Court, or High Court of Griqualand, such reviewing Court may reserve the question for the decision of the Court of Appeal (§ 16 Act 40 of 1882).

By the 5th Section of the said Ordinance No. 40, the grounds of review are given as follows:

(*a*) Incompetency of the Court in respect of the cause, including all excess of jurisdiction, &c.

(*b*) Incompetency of the Court in respect of the Judge or his near kinsman having an interest in the cause.

(*c*) Malice or corruption on the part of the Judge.

(*d*) Gross irregularity in the proceedings.

(*e*) The admission of illegal or incompetent evidence, and

(*f*) The rejection of legal and competent evidence (§ 3 of Ord. No. 73 of 1830).

In order to get the proceedings of an inferior Court reviewed, proceedings should be taken, not by notice of motion, but by summons, and the grounds of review should be given in the summons, and not merely say that the judgment was erroneous and contrary to law, unless it appears on the record that only one question of law had been raised in the cause, and what that one question was (*Granet* v. *Jansen*, and *Stephen* v. *Anderson*, 3 Menz., 458 and 511). Besides the name of the opposite party in the summons, the magistrate, or party in whose custody the records or proceedings in the Court may be, should also be called upon in the same summons to "return and certify to the Supreme (or whatever Court the summons is issued out of for the review) Court, a copy of such record and proceedings" on the return day named on the summons (Rule of Court 190; *Ex parte Wood*, 1 Juta, 388; and the *Queen* v. *Nathanson*, 5 Juta, 109).

In forwarding the record to the Higher Court, the Magistrate from whose judgment the review is sought should at the same time transmit "a statement of the facts which he shall find to have been proved, and his reasons for the judgment pronounced" (§ 7 of Act 43 of 1885).

Formerly the practice was to petition the Court for leave to issue summons for review, but now application may be made to the Registrar, who, if he is satisfied that the 190th Rule of Court has been complied with, may issue the summons without any applications to the Court (*Queen* v. *Nathanson*, 5 Juta, 109).

The 190th Rule of Court is not intended to alter the existing law but to provide machinery for enforcing the law; its object is to indicate the procedure which should be followed by parties wishing to invoke the power of review legally vested in the Court (*Prince Albert Board of Management* v. *Jooste and others*, 4 Juta, 400).

If any question of law should arise upon review of a judgment of an inferior Court, in a criminal case, the reviewing Court may reserve the question for the Appeal Court (§ 16 Act 40 of 1882). There is no specified time fixed within which a case should be brought under review, but it must necessarily be within a reasonable time; and though there may be an instance where there is no right of appeal, or the time for an appeal has lapsed, the Court can still review a case if any of the grounds for review mentioned

in the said Ordinances can be given (*Ghislin* v. *Syster*, Buch. for 1874, p. 57; and *Tabata* v. *Tabata*, 5 Juta, 328).

The Court has power to review the proceedings of a Magistrate in cases in which gross injustice has been done; as, for instance, by inflicting too heavy a fine, but a clear case should be made out and notice should be given to the Magistrate of the application (*re Hess*, Buch. 1874, p. 2).

Though no appeal can be had to the Appeal Court from a certificate of a Judge under § 47 of Act 20 of 1856, and § 2 of Act 10 of 1865, yet the Court may have power to review under the 32nd § of the Charter of Justice (*re Fine*, 2 Buch. App., 113).

The Court will not entertain an application for review in a criminal case where the judgment was one of "not guilty," although the Magistrate erred (*Distin* v. *Williamson*, 1 E.D.C., 20), nor where the verdict was "not guilty" on a mere issue of fact (*re Scholtz*, 3 E.D.C., 169).

A prosecutor cannot bring a Magistrate's judgment upon the merits of a criminal case under review (§ 4 Act 21 of 1876) except upon grounds which would justify the quashing of all the proceedings and the restoration of the parties to the position in which they were before the issue of the summons (*Prince Albert Board of Management* v. *Jooste and others*, 4 Juta, 400).

C. H. Van Zyl.

THE CONSTITUTION OF CANADA.

I.

A fascinating study is constitutional law—especially that which is the offspring of a complex organism such as the British North America Act. But its pleasures are sadly marred by the labour of piecing and matching the members which lie strewn amongst the judicial utterances reported in cases upon the construction of the Act. The policy of our Courts, including the Judicial Committee of the Privy Council, of deciding cases singly as they arise, without committing themselves to any general

expressions of opinion, has the effect of leaving open to debate almost any question arising on the Act, and makes it possible to withdraw any particular case or class of cases from the operation of a principle which may be apparent on the face of a case already determined. It also increases the difficulties of construction, and the labour of reducing the whole to a scientific arrangement.

Bearing this in mind, we ask, in advance, the indulgence of our readers, while we make the effort to reduce to some sort of orderly arrangement the decisions that have been given on the Act so far, or at any rate as many of them as may serve to illustrate the body of law. Many faults and short-comings there will be, we feel sensible.

The relation of the Legislatures to the Imperial Parliament.—The Parliament of Canada, and the Provincial Legislatures, are subordinate to the supreme legislative authority of the Imperial Parliament. To that body they owe their existence, and to it their allegiance, so that they may not transgress the limits assigned to them, nor may they nor can they enter into conflict with the supreme law-making body of the Empire. The constitutional entity created by the British North America Act is one of those political entities which occupy a subordinate relative position, and which Austin defines as but "a limb or member of another political society."(1) And again, " a political society which is not independent is a member or constituent parcel of a political society which is, or (changing the expression) the powers or rights of subordinate political superiors are merely emanations of sovereignty. They are merely particles of sovereignity committed by sovereigns to subjects."(2) And at still another passage, " now in order that an individual or body may be sovereign in a given society, two essentials must unite. The generality of the given society must render habitual obedience to that certain individual or body. Whilst that individual or body must not be habitually obedient to a determinate human superior."(3)

So it has been determined that "the exclusive legislative authority of the Parliament of Canada," granted by the ninety-first section of the British North America Act to make laws respecting Copyright, does not curtail the jurisdiction of the

(1) Lect. Jur. 4th Ed. 227. (2) Ibid. 240. (3) Ibid. 241.

Imperial Parliament to deal with the same subject in Canada. In *Smiles* v. *Belford*,[4] Mr. Justice BURTON said, "It is clear, I think, that all that the Imperial Act intended to effect was to place the right of dealing with colonial copyright within the Dominion under the exclusive control of the Parliament of Canada, as distinguished from the Provincial Legislatures, in the same way as it transferred the power to deal with banking bankruptcy and insolvency, and other specified subjects, from the Local Legislatures, and placed them under the exclusive jurisdiction and control of the Dominion." And Moss, J.A., in the same case, said, "It must be taken to be beyond all doubt that our Legislature had no authority to pass any laws opposed to statutes which the Imperial Parliament had made applicable to the whole Empire."

A similar conclusion was reached, without difficulty, in *Regina* v. *Coll. P. & S. Ont.*[5] A Provincial Act required all persons qualified to practice medicine in the Province to register their names and pay a fee. If not qualified under the local law they were obliged to pass an examination. The applicant was qualified in England and there registered, and under a British Act asked to be registered in Ontario without examination. The Imperial Act specially mentioned the colonies. HAGARTY, C.J., said, "it appears to us that the language of the Imperial Act already cited is too clear for dispute. It declares pointedly and most distinctly that a person on its register shall be entitled to registration in any colony on payment of the fee (if any) required for such registration; and the definition of 'colony' clearly includes Canada." To the argument that the exclusive right of dealing with Education was granted to the Provincial Legislatures by the British North America Act, his Lordship answered, "To this it may be argued that where the Federation Act speaks of any such exclusive right it means exclusive as opposed to any attempt to legislate by the Dominion Parliament.

The Status of Colonial Legislatures.—Though the Legislatures of the British Colonies are subordinate, they are not delegates of the Imperial Parliament in legislating, but have plenary power to make laws in relation to the topics assigned to them. The law

[4] 1 App. R. 436; 1 Cart. 576. [5] 44 U. C. R. 564; 1 Cart. 761.

when passed is of as much force and dignity, and as effectual for its purpose, as though passed by the Imperial Parliament. In *Hodge* v. *Reginam*,[6] where a Provincial Legislature created a Board of Commissioners with power to make regulations respecting liquor traffic, it was argued that the Legislature was an agent or delegate, and that no power was conferred on it to delegate its functions in turn to a subordinate body, and consequently that an infringement of such regulation was not a breach of a law; and the maxim *delegatus non potest delegare* was relied on. To this Sir BARNES PEACOCK, in delivering the judgment of the Judicial Committee, answered, "It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the Provincial Legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a Legislature for Ontario, and that the Legislative Assembly should have exclusive authority to make laws for the Province and for Provincial purposes in relation to matters enumerated in Section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and ample within the limits prescribed by Section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local Legislature is supreme, and has the same authority as the Imperial Parliament or the Parliament of the Dominion would have had, under like circumstances, to confide to a municipal institution or body of its own creation authority to make bye-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.

So, in a case from India, Lord SELBORNE, in delivering the judgment of the Judicial Committee, said, "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it; and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended

[6] L. R. 9 App. Cas. 117; 3 Cart. 144.

to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself."[7]

And, again in an Australian case, Sir R. P. COLLIER, after citing *Regina* v. *Burah*, and *Hodge* v. *Reginam*, said, " These two cases have put an end to a doctrine which appears at one time to have had some currency, that a Colonial Legislature is a delegate of the Imperial Legislature. It is a Legislature restricted in the area of its powers, but within that area unrestricted, and not acting as an agent or delegate."[8]

It will be observed that, in the first of these three cases the expression is used that the local legislatures are supreme, while in the other two the terms used are more guarded. The term " supreme " is evidently an unguarded expression. The legislatures are not supreme in any sense save that their laws, when not interfered with by a superior power, are of the same nature as those of the Imperial Parliament, entitled to absolute obedience.

Perhaps a better illustration, if we may so presume, is that when acting within their topical jurisdiction they are subject to no limitations upon their discretion. The American law-making bodies, in addition to being limited as to their topics, are limited to some extent in their power of dealing with them. Thus, no law can be made which impairs the validity of a contract, even by a body having power to deal with contract.

No such trammels are laid upon our Legislatures. Two very good illustrations of the valid exercise of untrammelled power are found in our reports. In *Re Goodhue*[9], it appeared that a testator had devised the residue of his estate in trust for such of his children as should be living at the decease of his widow. Before the widow's death, and on her application and that of the children, the Legislature of Ontario passed an Act authorising the division of the residue forthwith. And it was held that the Act was valid. DRAPER, C.J., said, " The Legislature have passed such an Act as the parties applying desired. They have, in effect, altered the testator's will—not to supply a defect which rendered it difficult or impossible for his trustees to carry his intentions into effect, but to substitute an intention contrary to what he has expressed,

[7] *Regina* v. *Burah*, L. R. 3 App. Cas. 889; 3 Cart. 409. [8] *Powell* v. *Appollo Candle Co.* L. R. 10 App. Cas. 282; 3 Cart. 432. [9] 19 Gr. 366; 1 Cart. 360.

by rendering the accumulation impossible, and making the division immediate which he directed should await the death of his widow. No English authority has been cited, nor do I think there is any which would warrant our denying the power to pass such an Act. . . For as in England it is a settled principle that the Legislature is the supreme power, so in the Province I apprehend that within the limits marked out by the authority which gave us our present constitution, the Legislature is the supreme power."

In *License Com. of P.E.* v. *County of P.E.*[10] it was held that the *ex post facto* operation of a Provincial Act did not on that account render it invalid. The power of the legislatures is consequently unlimited when acting within their topical jurisdiction.

The decision that the Local Legislatures are not agents or delegates of the Imperial Parliament, as applied to the particular case from Canada—*Hodge* v. *Reginam*—has produced a peculiar result. By the Act which came in question in that case, a Board of License Commissioners was created, with power to make certain regulations as to the conduct of licensed houses, for the breach of which penalties were imposed. By the fifteenth clause of the ninety-second section of the British North America Act, the Provincial Legislature may make laws respecting "the imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section." It was argued that the Provincial Legislature could not create a subordinate law-making body, for two reasons. First, because such a power is not found amongst the topics enumerated in section ninety-two; secondly, because, being an agent or delegate, it could not delegate its powers. But it was held that the breach of the regulation of the License Commissioners was a breach of the law of the Province. The result of this is that the Legislature which, though authorised to pass such a law, was at the same time subject to a superior authority which might disallow its Act, has by the creation of a subordinate law-making body put out of reach of the veto power all laws which might be made in the nature or guise of regulations upon the subject in question. Though each one of the License Commissioners' regulations would

[10] 26 Gr. 452; 2 Cart. 678.

have been subject to review and disallowance by the Governor-General in Council if they had been passed by the Legislature, yet, as regulations passed by a subordinate body created by such Legislature, they escape review and yet are held to be "laws of the Province." This is a conclusion which awakens suspicion as to the soundness of the decision.

Composition of the legislative bodies and their privileges.—By the seventeenth section of the Act, the Parliament of Canada is declared to be composed of "the Queen, an Upper House styled the Senate, and the House of Commons." By the sixty-ninth section of the Act, the Legislature of Ontario consists of a Lieutenant-Governor and a Legislative Assembly. By the seventy-first section, the Legislative of Quebec consists of the Lieutenant-Governor and two Houses, a Legislative Council and Legislative Assembly. And by the eighty-eighth section, the Legislatures of Nova Scotia and New Brunswick were to continue to exist as they existed at the Union.

By the eighteenth section of the Act, it was declared that the privileges, immunities and powers to be held, enjoyed and exercised by the Senate and by the House of Commons and by the members thereof, respectively, should be such as were from time to time defined by Act of the Parliament of Canada. But this was subject to a qualification defined in the following words:—"But so that the same shall never exceed those at the passing of this Act held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the members thereof." The meaning of this clause was ambiguous, in consequence of the use of the term "this Act," for it could not with certainty be determined whether it meant the British North America Act, or the Act of the Canadian Parliament defining the privileges. If the former, the Parliament of Canada could never acquire any privileges exceeding those enjoyed by the British House of Commons at the time of the passing of the British North America Act. If the latter, the Parliament could keep pace with the Imperial Parliament by passing an Act, but could not exceed the privileges of the British House at the time of passing of the Canadian Act. The ambiguity was disposed of by an Act, passed 38 & 39 Vict., chaptered 38, which recited the section in question,

repealed it and substituted therefore a section which makes it clear that the privileges to be enjoyed are never to exceed those enjoyed by the British House of Commons at the time of passing the Canadian Act. In pursuance of the power granted by the British North America Act, before the amendment referred to, the Canadian Parliament passed an Act declaring that the Senate and the House of Commons and the members thereof should have the same privileges as were enjoyed by the British House of Commons at the time of the passing of the British North America Act, and some specific privileges are defined in the Act. It is now consolidated in chapter eleven by the Revised Statutes of Canada.

The privileges and immunities of the Provincial Legislatures have been defined by two cases. They may be divided into two classes, the two cases in question furnishing illustrations of each. First, there are the rights and privileges of the Assemblies towards their own members, and secondly, those towards strangers.

As to the right to deal with a refractory member, the whole subject was discussed at great length in *Landers* v. *Woodworth*.[11] In that case a member of the Nova Scotia Legislature had, in his place in the House, made charges against the Provincial Secretary of having altered the records of one of the departments. A committee of enquiry was granted, and the charges were reported to be unfounded. The House thereupon declared the member guilty of a breach of its privileges and demanded of him that he should appear at the bar of the House with the doors open and make the following opology :—" Being convinced that in making the charge I did so without sufficient evidence to authorise me, in my place in Parliament, to accuse a member of so serious an offence, I do now apologise therefor to this House, and trust to be excused by this House for having preferred such a charge without sufficient and due consideration." Upon his refusal to accede to this dictation he was ordered into the custody of the sergeant-at-arms for removal from the House, and being forcibly removed, he brought an action of assault. The learned Judge who tried the case told the jury that if the turning-out of the plaintiff was in point of fact necessary, on the ground that he was an obstruction to the business of the House, he would have no right of action;

[11] 2 S. C. R. 158.

but if they found that he was turned out, not because he was an obstruction, but merely for a contempt in refusing to make an apology for a past offence, he ought to have a verdict. The jury found that he was turned out for contempt, and gave him a verdict. The Supreme Court held the verdict to be right. An exhaustive review of the authorities by the Supreme Court shows the law, as to the Provincial Legislatures, to be that, in the absence of express grant, the Legislature had no power to remove a member for contempt unless he was actually obstructing the business of the House.

In Ex parte Dansereau[12] it appeared that the Legislature caused the arrest of a witness for contempt in refusing to answer questions put him upon an enquiry ordered by the House. Power was conferred upon the Legislature by its own Act to summon witnesses, etc., and it was held by the Court of Queen's Bench of Quebec, Appeal side, RAMSAY, J., dissenting, that the Act was valid, and that the Provincial Legislatures have, as incident to their express powers, the right to summon witnesses and to punish persons who disobey such summons, the right being necessary to the proper exercise of their powers of legislation and the control assigned to them in respect of the administration of public affairs—a decision, said Sir WILLIAM RICHARDS, C.J., in *Landers* v. *Woodworth*[13] "fully warranted by the terms of the provincial statute."

Distribution of Legislative powers.—The power to make laws is distributed amongst the several legislatures by the ninety-first, ninety-second, ninety-third and ninety-fourth sections of the British North America Act. Inasmuch as various topics are assigned to each Legislature, their jurisdiction with regard to the limits so assigned may be called their topical jurisdiction. Then, touching their topical jurisdiction, they in most instances have exclusive jurisdiction, but in some concurrent, in some oblique or auxiliary jurisdiction, and in all cases, perhaps, inferential or incidental jurisdiction.

Topical jurisdiction.—We might dismiss this head of the subject by simply remarking that the different topics of legislative jurisdiction are found in the sections already cited. It might, however, be expected that human ingenuity and foresight would not be

[12] 1 Cart. at p. 273. [13] 1 Cart. at p. 366.

sufficient to include all matters that might require the exercise of jurisdiction, and that cases might arise which would necessarily, with respect to subject-matter, be difficult to classify. Accordingly a rule has been laid down for the purpose of ascertaining within which jurisdiction—Dominion or Provincial—a subject falls. In *Citizens and Queen Ins. Co.* v. *Parsons*[14] the Judicial Committee, in reviewing the distribution of legislative powers, said, "The first question to be decided is, whether the Act impeached in the present appeals falls within any of the classes of subjects enumerated in section 92, and assigned exclusively to the Legislatures of the Provinces; for if it does not, it can be of no validity, and no other question would then arise. It is only when an Act of the Provincial Legislature *prima facie* falls within one of these classes of subjects that the further questions arise, viz., whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, and whether the power of the Provincial Legislature is or is not thereby overborne." This rule was again referred to in *Dobie* v. *Temporalities Board*,[15] where its principle was affirmed.

The frame of the ninety-first section indicates a predominating power of legislation in the Dominion Parliament, unless the subject-matter in question is taken away by express exception in favour of the Provincial Legislatures. To the Dominion Parliament is assigned the full power of making laws for the peace, order and good government of Canada. Whatever is assigned to the Legislatures is by way of exception therefrom. Consequently, if not found among the exceptions by express words or reasonable intendment, the subject-matter must be included in the grant to the Dominion Parliament.

There is involved in the topical jurisdiction of the legislatures, the question of the measure of their powers to deal with antecedent laws. By the one hundred and twenty-ninth section of the British North America Act, it is declared that, "except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia and New Brunswick, at the Union, and all courts of civil and criminal jurisdiction, and all legal commissions, powers and authorities, and all officers, judicial, administrative and ministerial

(14) 2 Cart. 165. (15) 2 S. C. R. at p. 191.

existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick, respectively, as if the Union had not been made ; subject, nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Provinces, according to the authority of the Parliament or of that Legislature under this Act."

The exception contained in the parenthesis might, at first sight, seem to indicate that Imperial laws could not be repealed. But that would be too plainly repugnant to the grant of legislative authority given by the Act. The Statute of Frauds is no doubt susceptible of repeal by a Provincial Legislature, though an Imperial Act. The exception must therefore apply to those statutes of the Imperial Parliament which are of general effect in the Empire, and are intended to apply, as well to those dependencies which are self-governing as to Great Britain and Ireland. Such are the Merchants' Shipping Act and the Copyright Laws; and whenever an Imperial Statute is passed with express reference, or by reasonable intendment referring to Canada, it must, as we have seen, necessarily override our local legislation.

With respect to other laws, whether originating in the Imperial Parliament and introduced with the Common Law, or being a part of the Common Law itself, or originating in the Legislatures of the Province of Canada, Nova Scotia, or New Brunswick, they fall naturally within the jurisdiction of that law-making body of the Dominion of Canada which could, under the powers granted by the British North America Act, itself enact the law. In *Dobie* v. *Temporalities Board*,[16] it appeared that by an Act of the late Province of Canada a corporation was created which had its corporate existence and exercised its rights and liberties in the old Province, now divided into the Provinces of Ontario and Quebec. An Act of the latter Province attempted to destroy the corporation, and to substitute for it a new one. It was held by the Judical Committee that the Provincial Act was invalid. Lord Watson, in delivering the judgment of the Committee, said,[17]

[16] 1 Cart. 351. [17] p. 365.

after quoting the section above quoted, "The powers conferred by this section upon the Provincial Legislatures of Ontario and Quebec, to repeal and alter the Statutes of the old Parliament of the Province of Canada, are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by other clauses of the Act of 1867. In order, therefore, to ascertain how far the Provincial Legislature of Quebec had power to alter and amend the Act of 1858 incorporating the Board for the management of the Temporalities Fund, it becomes necessary to revert to sections 91 and 92 of the B. N. A. Act, which enumerate and define the various matters which are within the exclusive legislative authority of the Parliament of Canada, as well as those in relation to which the Legislatures of the respective Provinces have the exclusive right of making laws. If it could be established that, in the absence of all previous legislation on the subject, the Legislature of Quebec would have, been authorised by section 92 to pass an Act in terms identical with the 22 Vict., cap. 66 [the Act whose repeal was attempted], then it would follow that the Act of the 22 Vict. has been validly amended by the 38 Vict., cap. 64 [the Act whose validity was in question]. On the other hand, if the Legislature of Quebec has not derived such power of enactment from section 92, the necessary inference is that the legislative authority required, in terms of section 129, to sustain its right to repeal or alter an old law of the Parliament of the Province of Canada, is in this case wanting, and that the Act 38 Vict. cap. 64, was not *intra vires* of the Legislature by which it was passed." Their Lordships then dealt with the alleged power to deal in each Province with the funds within that Province, and negatived it, and finally denied the powers of the two Provinces, acting conjointly, to destroy or in any way affect the corporation. "It is difficult," said Lord WATSON, "to understand how the maxim *juncta juvant* is applicable here, seeing that the power of the Provincial Legislature to destroy a law of the old Province of Canada is measured by its capacity to reconstruct what it has destroyed."

A similar result was arrived at in *Bourgoin* v. *La Com. de Chemin de Fer de M. O. and Oc.*,[18] where it was held that a com-

[18] 1 Cart. 253.

pany created by the Dominion Parliament could not be affected by Provincial legislation touching its existence. "The combined effect, therefore," it was said "of the deed and of this Statute, if the transaction was valid, was to transfer a federal railway, with all its appurtenances, and all the property, liabilities, rights and powers of the existing company, to the Quebec Government, and, through it, to a company with a new title and a different organisation; to dissolve the old federal company, and to substitute for it one which was to be governed by, and subject to, Provincial legislation." It was contended that the Quebec Legislature was incompetent to do this; and Sir J. W. COLVILLE, continuing, said, this contention appears to their Lordships to be well founded."

Of a similar character are the decisions which settle the inability of the Provincial Legislatures to render liable to seizure the salaries of Federal officers[19] or to impose a tax upon them[20]; though these are rather founded upon the mutually exclusive character of the Canadian Legislatures *inter se.*—*Canadian Law Times.*

(*To be Continued.*)

APPEALS IN NATIVE CASES.

The question of the precise manner in which native laws and customs are to be dealt with in this Colony and in adjacent territories, has latterly come before the public in several cases, and enough has been shown to make it clear that the matter requires to be placed upon some more definite basis than that upon which it at present rests. An important decision given by the Eastern Districts' Court during the June term with reference to the right of appeal to that tribunal in Native cases decided by the Magistrates in the Transkei, forms a good illustration of how the question stands. In this case, namely that of *Kobani* v. *Matyoro*, the question involved was whether the wife of a Native was justified in leaving him, and returning to her father, on the ground of cruelty exercised towards her. The Magistrate had decided that, though there had been some cruelty, it was not more than is customary

[19] *Evans* v. *Hudon*, 2 Cart. 346. [20] *Leprohon* v. *City of Ottawa*, 1 Cart. 592.

among Natives, and had, on this ground, ordered the return by the father of certain cattle, being part of the woman's marriage "dowry." In the end, the Court held it had jurisdiction to hear the appeal, and reversed the decision of the Magistrate. Mr. Sampson, who appeared in support of the appeal, argued the question at length, showing that, by the Proclamation No. 110 of 1879, § 23, the Magistrates in the Transkei are given jurisdiction under the ordinary law of the Colony in all civil suits except in Native cases, which latter may be decided with reference to Native law. By § 25, appeal is allowed against any judgment of the Magistrates to the Chief Magistrate; but by Act 40 of 1882, the right of appeal to the Chief Magistrate was changed into a right to appeal either to the Chief Magistrate, the Supreme Court, or to the Eastern Districts' Court. In the case, however, of *Tabata* v. *Tabata* (5 Juta 328), being an appeal from a decision under the Native Succession Act (18 of 1864), the Supreme Court decided that that tribunal never had any authority to decide disputes according to Native law and custom. This was pointed out by the counsel for the appellant but the Judge President held, the other Judges concurring with him, that although they had recently held that Native marriages could not be recognised in this Colony (*Malgas* v. *Gakaiwu*), it did not follow that such marriages in the Transkei should not be recognised. In the latest case, that of *Mbono* v. *Manoxowani*, which was an appeal from the Transkei, the whole matter was fully discussed by the Judges, and the right of appeal to the Eastern Districts' Court in such matters was recognised, though the Judges differed in their view as to the merits of the case itself.

The effect of these decisions is to leave the Eastern Districts' Court in a somewhat anomalous position as to Native questions. Polygamous Native marriages in this Colony cannot be dealt with, the Court excluding such customs as *contra bonos mores*; but, when the same customs come before it from the Transkei in the form of appeals, they become purified, by passing the waters, and can be duly entertained by the Eastern Districts' Court. That the decision in *Kobani* v. *Matyoro* is based upon sound principles, there can be no doubt, though there may be a question as to the extent of the jurisdiction of the Eastern Districts' Court on appeal—that is, it would seem possibly to extend only to questions of procedure, &c.,

on the part of the Magistrate, not to his substantive decision on the facts and the Native law applicable to them, the latter being apparently supposed to be known by all Magistrates by some kind of inspiration or intuition. Unfortunately, according to Mr. Justice JONES, who was recently in the Transkei, the views of Magistrates differ materially as to Native law, and he suggested the advisability of some Code of Native law being drawn up to guide both the Magistrates and the appeal Courts. Of the soundness of this suggestion in its general bearing there can be no doubt, but the further question is naturally suggested, whether it would not be more desirable that there should be an appeal Court for such cases in the Transkei itself, and that the anomaly should thus be avoided, of appeals being heard on Native customs in a Colony which declares such customs to be immoral within its own borders, and in which the Courts are not likely to take such critical cognisance of Native customs as will naturally be the case in territories where they are recognised. Whether the non-recognition to some extent of these customs in this Colony is strictly correct, upon the broad and liberal principles of jurisprudence generally accepted in the present day, notably in India, and many other parts of the British Empire, may be open to question; but that it is in accordance with the law of this Colony as hitherto understood, there is no room to doubt. But, however this may be, there can be no question of the undesirability of increasing such apparent conflict of law as we have already, by importing an additional and more delicate element from the Transkei, where Native customs are more fully recognised than here. This course can only make confusion worse confounded, and it would be better to leave these cases (on the principle of its being desirable to "wash one's dirty linen" at home) to be dealt with in the Transkei. A Court of appeal could easily be formed in the Transkei itself, which could finally dispose of such cases in a satisfactory manner; and in fact the whole matter could be dealt with in that territory on some such basis as that on which it has now for many years stood in Natal. There is in that Colony a Native Code—which is now being revised—for the administration of Native matters; and if the introduction of a Code for the Transkei is desired, it would be well that the existing Natal Code should be carefully studied. The

proposed revised Code is apparently too elaborate to be workable, and the likelihood seems by last accounts to be that, at all events for some time, no steps will be taken for its adoption; and in this probably our neighbours in Natal will act wisely. There are, indeed, cogent reasons against any elaborate codification of the very primitive and certainly rather doubtful customs which form the staple of "Native Law" anywhere, and possibly, upon due consideration, it may be deemed more desirable to adopt, at all events to some extent, the plan of proving in any given case what the Native custom is by evidence, in the same way as a trade custom or a foreign law would have to be proved in an ordinary Court. Codification would have the effect of once and for all consolidating, and by consolidating giving new life to, a set of customs which upon every ground, both of sound law and of morality, it is not desirable to perpetuate longer than is absolutely necessary. An authoritative text-book on the main principles of Native law and custom, drawn up with the assistance of experienced Magistrates, would be more suitable than a Code, into which some mistakes would certainly slip, which it would be afterwards very difficult to remedy. The report of the Native Commission of 1883, would afford valuable assistance in the preparation of such a text-book; and by means of a guide of this kind supplemented where special points might arise by evidence of an expert on the particular custom which applied, it would be possible to secure a sufficient elucidation of the general principles of Native laws and customs for administering them, until such time as they may be superseded by a better system, without giving to them the importance and finality which would be conferred upon them by codification and formal legislative enactment. It would be unwise, and in many instances unjust, to ride rough-shod over Native customs, but it is equally unwise, and may lead to equal injustice, to rush to the opposite extreme and give to them, in a crude and untried state, the authority of carefully-formulated and accepted laws. By degrees some of the Native customs would, by the plan suggested, acquire this force by reason of decisions recognising and applying them, just as many of the best-accepted principles of English common law, have become established simply through the recognition of trade and other customs in the decisions of the Courts. On the other hand, Native customs which are such

that a civilised Court could not continue to recognise them, would be either modified by decisons, or would fall into disuetude, or might, in one or two special instances, be done away with, either directly or indirectly, by legislative enactment.

Codification naturally appears the simplest way to deal with a question of this nature, but experience may raise a doubt as to the advisability of attempting too nice a definition of customs of a very primitive character. Some few prominent principles may be usefully declared, but any attempt at close definition, or at hard and fast rules in applying such principles, should be avoided as likely rather to lead to confusion than otherwise. In an ordinary way, the benefit of Codes is apt to be over-estimated; and as applied to Native customs, one objection to codification lies in the very strictness which gives an attractiveness, sometimes over-estimated, to codification generally. What is wanted under existing circumstances is some means of dealing with Natives without unduly disturbing their laws; but this latter result must inevitably be brought about if, with only a very limited knowledge of what those laws are, an attempt be made to deal with them within the sharp lines of a Code, the applicability or otherwise of which in practice has afterwards to be ascertained. Codification, to be useful, should rather follow than attempt to forestall the decisions of the Courts. It should be rather a short method of arriving at what those decisions have established, than a hard and fast direction as to what they are in all instances to be. Any attempt at drawing up a Code without such practical test of how far and in what manner Native law can be effectually administered in the way in which it would thus become formulated, must be, to a large extent, a leap in the dark, which might lead to very serious consequences. Even in the Colony itself, such questions have to be handled with great care. It may be doubtful whether any good would result from legislation as to Native marriages which should go farther than providing some system of registration of the first wife, who, it might be declared, would alone be recognised in respect to questions of succession—except, of course, in the case of death, when a second wife would be recognised, if the form of registration had been duly gone through with regard to her. As to the very-much-miscalled "dowry," that is, the cattle paid to the father of a girl on her

marrying, it would seem beyond question that the proper position for the Courts to take is to declare that, while giving cattle in such a case is not in itself illegal, no contract to do so will be enforceable, simply for want of consideration—such an act being regarded as perfectly voluntary; in fact, as a free-will present on the engagement being concluded, and in no way affording a cause of action even before the marriage. It is a mistake to imagine, as is often carelessly asserted, that the payment of the so-called "dowry" cattle constitutes the marriage. The Natives themselves have a distinct, if somewhat savage, ceremony for the latter purpose, in the form of a dance, and there is no more illegality necessarily in being married in this way than by means of registration. Where illegality comes in, is in the father or guardian at times forcing a girl to marry against her will someone who will pay a handsome "dowry;" but how this is to be put an end to altogether, it is not very easy to decide. The course adopted in Natal is to have an official Native witness sent from the Magistracy to be present at every Native wedding, and whose business it is to ask the girl whether she marries of her free will, and to stop the ceremony if he has reasonable ground to doubt that such is the case; but some objections have been found to this plan in practice, and it would be better, if possible, that such declaration should be made before a Magistrate.

But, however this matter may be finally dealt with in this Colony, it must be manifest that there are grave reasons for hesitating to introduce heroic remedies into Native territories. The best that can be done at the present time is to devise some system by which Native customs can be dealt with in a form which, though probably far short of what we might desire, will still satisfy the Natives without being repugnant in any serious way to recognised standards of justice and morality. No Code can succeed in suddenly raising the whole tone of a semi-savage people; and, on the other hand, no code will be of practical utility unless it be acceptable in the main to the Natives themselves. By aiming at too much we should simply be encouraging litigants to have recourse to their Chiefs, instead of to the recognised tribunals, for the settlement of their disputes, and by this means we should perpetuate the kind of *imperium in imperio* among the Natives in

the territories under our control, which it is manifestly our policy to diminish by all legitimate means.

ALBERT C. DULCKEN.

ON WITCHCRAFT.

BY NGXAKAXA.*

We natives suffer from a great difficulty, one we are unable to make you white people understand. You tell us there is no such thing as witchcraft; that we must remove the belief from our minds; and if we encourage it, punishment will follow. Good sir! what are we to do? We feel that a white man knows nothing of witchcraft; that he has no medicines of the potent and marvellous nature of those possessed by our doctors, and our wizards and witches.

Has a white man medicine which he can bury in the kraal, and thereby cause the cattle gradually to die; or put somewhere in front of the hut, and ensure the death of some particular member of the family inhabiting that hut?

Can he, by means of his medicines, make the spirits rise from the water and deform one's body; or deprive one of sight or hearing?

Can he, by secretly placing medicine about the person of the owner of a horse, cause his horse to become weak, and fail on the journey, lose the race, or stumble and break its master's neck?

* This article is inserted in these pages after some hesitation as to whether the subject is appropriate to the *Cape Law Journal*. "Witchcraft" is frequently darkly hinted at in connection with trials in the Native Territories, and, beyond question, it still largely affects the majority of the tribes of those territories under the Colonial Government. From this point of view, the following pages furnish a valuable insight into an institution of the utmost possible gravity to many thousands of native people, who, in the very few years during which they have been subjected to civilised rule, have made wonderful progress, thanks to the zeal and discretion of good Magistrates, but who, at the same time, can hardly be expected to shake off very readily a superstition which has been an incident of their national life for centuries.—ED. *C.L.J.*

Has he anything by which he can call the lightning down from the heavens to strike his enemy, his hut, his cow, or his horse?

You reply, he has not. Then you live in peace, and sleep undisturbed. But with us it is not so. We know our people have this awful power at their command, and we therefore live in continual fear of our lives.

I must tell you we have some protection, otherwise life would not be bearable. We have remedies to keep the lightning away, to make the horse strong, to keep off the evil spirits, and so on.

For instance, if the girl you love does not return your affection, you take certain medicine to make her love you. There are several kinds; one is smoked in the pipe when near the girl, so that she may inhale the fumes; another is applied to the lover's body as a wash, and in many other ways, according to the directions you receive from the man who supplies you with the charm.

If you are about to race your horse, you take medicine to make him run. If you go to Court, or engage in a dispute with another, you provide yourself with a charm, which you chew while the case or dispute is going on, so that you may be successful. In fact, for every evil-causing medicine, there is another to counteract it; and the success of either one or the other depends upon the skill and knowledge of the man from whom you obtain it.

I do not feel that I can go into this question as fully as it deserves. It is a very large one. To us it is like your belief in unknown beings beyond the skies, of which we are told by the Missionaries; and if we were without it—I speak of natives like my friends and myself, who know nothing of the white man's habits and ways, and have no white man's customs or Missionary beliefs to control us—we should continually be fighting and quarrelling; and it would be impossible for us to have even a social gathering of any kind without a disturbance.

As it is, the fear of an accusation of witchcraft obliges a man to be cautious in the expressions he makes use of with regard to his neighbours. He is afraid to threaten, or become pointedly abusive, lest the first misfortune which befalls the threatened party should be laid at his door.

There is a certain line of conduct we know we have to follow, and if this is not done we are placed under the ban, and may be held responsible at any time for accidents and calamities happening to those residing in the neighbourhood.

A white man, I am told, on feeling ill, remarks to himself, "*What* is it? What have I done to make myself ill?" But with us, when seriously ill, we immediately remark, "*Who* is it? *Who* has made me ill?

To a native like myself, a white man's doctor is not satisfactory. At first, certainly. When he puts his short stick against my chest and body, and listens at the other end, then taps, and tells me to cough and utter certain words, he convinces me he is a clever man, and by some mysterious means which he possesses, he is divining the evil doings of my enemy which are going on inside. But bitter is the disappointment after all this, when he tells me there is nothing very much the matter with me, and gives me a small bottle of medicine, and instructs me to take a few drops every day. And when I take them I feel nothing, no burning inside, no bitter taste, no nausea, nothing at all. I ask myself, how is a thing with no taste (*eduma*) to cure me?

There are many ways in which injury may be inflicted upon us by our enemies; and when we consult a doctor we do not feel satisfied unless he gives full reasons for the cause of the ailment. Our medicines are all strong, and disagreeable of taste, and a great quantity is taken at a time. That mostly used is an emetic (*Mhlanziso*); about a pint is taken as a dose, and after swallowing it the sick man sits with a bowl of thin porridge beside him, which he takes at intervals, otherwise the strain caused by his efforts to vomit would so exhaust him as to cause his death. Patients do die occasionally while taking this medicine; then we do not, however, blame the doctor, but the patient, for not taking his porridge at regular intervals, and in sufficient quantities.

We have a great respect for the *sanusi*, or witch-doctor, as you white people call him. He is really the enemy of witchcraft, and it is to him we fly for help when our foes are attempting to destroy us.

It is as well I should explain here that when we are overtaken by an ordinary illness, we do not at once take a serious view of the

case. It is when the pains become persistent, and the local remedies prove to be useless, that we begin to look about, and try to discover who the individual is who is attempting to destroy us. A serious complaint cannot be passed over without one's suspicions be aroused, and one's nearest enemy implicated. No sudden death or lingering illness can be attributed to natural causes.

We know there are wizards (*amaggcira*) amongst us, who are versed in the arts of witchcraft; and it is to these people we apply if we wish to punish a neighbour against whom we may have a grudge.

The wizard (*eggwira*) is feared by all. We know he has so much power that to fall out with him means prompt and instant retaliation.

Just consider what he has at his command for injuring his fellow-beings. Let me commence with the baboon (*mfene*), his most dreaded agent. No white man can realise the horror we have of this animal (when not in its natural state in the forest). Every wizard is supposed to have one in his service. He calls it at night when required by his customers, to place medicine in the hut, to bury it in the kraal, and to deal with it in various other ways.

A Kafir who goes out at night and sees, or imagines he sees, a baboon amongst the huts, becomes paralysed with fear. He calls his friends together, and prompt steps are taken to consult the doctors, and guard against evil results.

I am confident that even a man converted by the Missionaries, who can read and write, who gives up Native customs, wears Missionary clothes, and preaches to the people, even he would be terrified were he to discover a baboon on the roof of his hut, or to notice its shadow as it scampered out of the kraal into the moonlight. He would at once temporarily forsake the teachings of his Missionary and fall back upon the customs of his father, and try to find out the cause of this visitation.

The wizard does not depend upon his baboon only. He also works with the lightning through the *mpundulu*, or lightning-bird, as you white people would call it, which is supposed to live in the sky, and controls and directs the elements above.

Every Kafir has a sincere and firm belief that lightning and thunderstorms are caused by the *mpundulu*. Some of us have seen

it, a drab-coloured bird, with white spots, red legs and beak, and about the height of a man. It is seen in the flash, when the lightning strikes the earth. The bird is tamed by the wizard, and if it is desired to cause destruction by its means, no difficulty is found in getting its services through the wizard.

Then there is the *Tikoloshe*, a small, evil spirit, in the form of a man, well developed and proportioned, but very short. He is a faithful servant of the wizard, is invisible at times, and his duties are generally performed at night, when he visits the kraals and performs some act of destruction on his master's behalf, or that of his client. Few people have seen the *Tikoloshe*. Not long ago one of our leading men heard the dogs barking, and on going out he discovered a well-developed dwarf beating them off with a stick. The dwarf walked backwards for a few yards, and then suddenly disappeared; the barking of the dogs ceased, and the owner of the hut stood peering into the darkness, knocking his knees together with fear, as he speculated upon the evil that would result from this unexpected and unfortunate visit.

A short time ago, in this neighbourhood, the girls were gathering firewood in a ravine, when to their amazement from amongst the bushes appeared a *Tikoloshe*. After staring at them for a short time, he asked them what they were going to do. They told him.

He asked: Is Ntoapi there?

They replied: No!

He said: Then you shall not gather firewood here! Go home! I am Mdwaba, and live in Mdwaba's home.

The girls fled. Great was the terror of the parents when they reached home, more especially as Mdwaba was the name of the favourite ox of one of their neighbours.

But still greater was the alarm a few days after, when one of the men, whilst searching for a lost goat, discovered a *Tikoloshe* lying dead in the valley*, with his thigh-bone broken. Poor man! He felt his responsibility, and rushed home at once to communicate to the neighbours what he had seen. A meeting of intimate friends was at once called; but I am unable to tell you what was said.

*The *Eggira* kills the *Tikoloshe* should he unnecessarily expose himself during the day.

To be connected with the *Tikoloshe* is at all times unpleasant; and there are those amongst us who do not scruple to get their friends into trouble by repeating these incidents to the Magistrate. It is always, therefore, considered wisest to exercise the utmost caution, and only those intimately acquainted are let into the secret.

The *Tikoloshe* is a source of continual worry and mischief. He causes more trouble than any other evil spirit. He is especially fond of the women, and they live in daily fear of a visit from him.

I may tell you that even the excessive rains of the past year are attributed by us to the fact that a *Tikoloshe* was killed at the *Nqabara*, near the sea, during the early part of the year. A great deal might be said about this little man, but I have said sufficient to convince you of his reality.

The wizard has also the use of such dead people as he may be able to raise from their graves; and another valued accessory is the snake.

We have several remedies for these evils, as I have already told you; but recourse must *first* be had to the *sanusi* (a witch-doctor). *He* discovers who has sent the lightning-bird, or baboon, or *Tikoloshe*, or caused the evil from the effects of which the applicant is suffering.

When a visitation from the evil spirit has taken place, the sufferer's near relatives and neighbours are called together, and a long and serious consultation takes place, resulting in a unanimous resolve to apply to our deliverer, the *sanusi*, for assistance.

The party is organised, and a start is at once made for his residence, which is approached with caution, every endeavour being made to conceal the object of the visit, so as in no way to give the *sanusi* a clue as to its object. But he soons discovers that it is to consult him; and after a few words he tells the people where to go and wait, until he can attend to them.

He does not delay long, and makes his appearance, followed by two or three students, who are qualifying for his profession.

I may here diverge for a few moments to tell you that these students have to serve for a year or more before they are qualified. They are confirmed as members of the craft by a series of important ceremonies, dances, feasts, exhortations, lectures, sacrifices,

and the presentation of small horns (*Izigodlo*) in which to keep medicine, and an iron rod (*Tulugxa*) with which to dig medicine roots.

The *sanusi* arrives at the kraal where the party has assembled, attended by the students, who wait upon him, and render such assistance as may be required.

The people sit on the ground, forming a half circle, the *sanusi* facing them, with his students standing behind him.

The "smelling-out" then commences. The *sanusi* begins with an incantation, calling upon the spirits of his ancestors to assist him in the onerous and serious task he has before him; and he asks the Great Spirit of all (*Tixo*), to give these minor spirits wisdom. He then sings a solemn chant, in which all join, and he begins gradually to work himself up for the occasion, spreads out his arms, raising and lowering the hands, first above the head and then down to the knee, keeping time with his heels as he stands on his toes, and brings them both down to the ground with a loud thud. He makes hideous faces, as if he were wrestling with the spirits of his ancestors. He throws his head backwards and forwards and from side to side. He draws his body in and pushes it forward. He glares over his shoulders, first the right, then the left, distorting his face to the utmost of his power; and these contortions are continued until his body is bathed in perspiration.

The audience, in the meanwhile, becomes equally excited. The people sit with their blankets lowered to the waist, the upper portion of the body being naked. The silent, sullen party which sat down at the commencement of the proceedings, gradually emerges from a condition of absolute sulkiness to a state of intense fanatical excitement. Each one believes himself to be surrounded by the spirits which have come there at the *sanusi's* bidding. Some have even heard these spirits communicating with the *sanusi*.

Every man has a piece of root—the family charm—in his mouth, which he determinedly chews, as he throws himself vigorously into the performance of his share of the function. And so it goes on until a diversion is caused by the *sanusi*, as he springs off the ground, calling out:—

Vumani! (Agree).

Siyavuma! (We agree), the people reply.

Ndiyawazi umhlola enize ngawo! (I know what you have come about); he yells in a hoarse and excited tone.

Siyavuma! the people again reply, emphasising the reply, on each occasion, with three or four measured claps of the hands, particularly good time being observed.

Kufa umntu? (A man ill?) says the *sanusi*.

Siyavuma! they reply again.

Ngu mntana ofayo? (A sick child?)

Siyavuma!

And so it goes on, the *sanusi* making interrogative assertions until he suddenly discovers that the clapping and shouting becomes more animated. He then feels he is on trail.

Nkomo zi yafa! he cries.

Siyavuma mhloka!† his clients reply.

Sezine xesha zikula! (For some time they have been sick.)

Siyavuma! they reply.

The excitement at this stage is beyond my powers of description. Every individual member of the party is so absorbed in the work, that he becomes quite oblivious to the fact that any other persons are present but himself and the *sanusi*. He shouts, claps his hands, chews his charm, sways his body to and fro, and conducts himself as if he were possessed by all the spirits in the country. Each word the *sanusi* utters in the right direction excites him more and more; he is overcome with the wisdom of the man, and the wonderful manner in which he is gradually discovering the cause of their misfortune and confirming the suspicions they entertained when they left home.

The *sanusi* himself, when he finds that the spirits have not deserted him, also displays much excitement; he jumps and dances with renewed vigour, his gesticulations become more exaggerated, and his general appearance and conduct strike his audience with feelings of awe and profound respect. The only individuals present who appear to be in their ordinary frame of mind are the students, who sit behind their master, and whose weird and continuous howls tend greatly to add to the unnatural feeling which everyone present possesses.

†Mhloka is merely used as a term of flattery, and to encourage the *sanusi*. It has no particular meaning.

This condition of affairs goes on until the *sanusi* has sufficiently described the cause of the evil, and indicated to the people who the man or woman is who is responsible for it. The actual wizard, the person who provides the medicine, is not mentioned, he being only the indirect cause, and in most cases a resident in a different part of the country. After the *sanusi* has described or pointed out the offender, the excitement gradually subsides, the meeting breaks up, and the people return to their homes.

In the good old days of Hintza, the matter would be promptly settled. The party would go home, the culprit being probably one of the number, and that night or day he or she would be killed; and should he escape, which would most likely be the case if he attended the meeting, his cattle would be eaten up (*ukudliwa*) and his hut destroyed.

We are not allowed to mete out justice in this prompt and speedy manner now-a-days. We go home and consult together (*ukubunga*) as to the best means to be adopted for punishing the guilty one. Everything that it is conceivable to invent is suggested; but we always have the Magistrate and the officers of the Government in our minds, and generally have to resort to such unsatisfactory measures as only burning the man's hut, stabbing his horse, or effecting some trivial retaliation of this kind, which in no way compensates for the injury his wickedness has caused.

NATIVE MARRIAGE LAW.

We have been favoured by Mr. James Ayliff, C.C. and R.M. of Graaff-Reinet, with the following note on the Native custom of *Ukulobola*. The opinion of so eminent a public servant, so widely experienced in Native affairs, cannot fail to be of use at a time when so important a question as that which affects the legality of Native marriages has assumed a position of great prominence, and, in consequence of recent decisions, is being warmly discussed amongst the Native populations:—

The law of *Ukulobola* I consider a necessary provision for the protection of the woman. The husband having received her from

her father on the payment of cattle, is bound to provide an establishment for her, and to protect her and treat her as a wife Should he fail in his duty, causing her by neglect to suffer hunger or privation, &c., she may return to her father, and if it can be proved that he is in fault, he forfeits his claim to the cattle he paid for her, and he has then the alternative of paying more cattle to get her back, or losing the cattle, and having the reproach of an empty house.

If, on the other hand, the woman voluntarily deserts her house, and no blame can attach to the husband, he is entitled to recover all his cattle, unless she has borne children to him, in which case the children belong to the father, and each child is considered equivalent in value to two head of cattle, and he recovers his cattle less those considered at that valuation.

On the death of a wife the husband cannot claim the cattle. On the death of her husband the wife remains in possession of her house, and in the enjoyment of all the rights and privileges connected therewith. Should she elect to return to her father, she may not remove any of the property or children of that house, and the heirs may claim the cattle.

Should she, however, be in a position to prove that she has been persecuted, her rights and privileges interfered with, or does not receive that protection she is entitled to, and that the heirs are the cause of the house having been deserted, they may not claim the cattle. Children cling to the father's house.

An empty house, except by death, is a reproach. Take the case of Gangelizwe, when his brutal conduct caused his Great-wife, Kreli's daughter, to desert her house, he moved heaven and earth to induce her to come back, not because he wanted the woman, but because of the reproach that his Great-house was without a wife, her son without a mother, and the tribe without a queen. To wipe out this reproach he would gladly have paid any number of cattle, but Kreli did not want cattle, he wanted to punish him; he knew that cattle payment would be no punishment, but the reproach was, and he turned a deaf ear to his entreaties. And it was only in consequence of the Gcaleka war, when the tribe was scattered, in her crippled condition she was unable to take to the bush, she returned to her house, where she was received with open arms by the tribe.

On my meeting Gangelizwe after her return, I was asking him about her, when he told me that her appearance indicated recent maternity, but he asked no questions; he being only too glad to get her back.

I am not aware whether any women were examined by the Native Laws Commission, but I have often asked Kafir women if they would rather be married with or without cattle, and the reply has invariably been, "with cattle, as I prefer being a wife to a *Dikazi*." And I have no doubt that women would be found to be the strongest opponents to a repeal of the custom.

I have heard men say that they would be glad if *ukulobola* was done away with, as they could then take wives and turn them off so soon as they tired of them, and take others.

I remember on one occasion trying a case in Kafirland, of a dispute between two women, when, during the trial, one of them turned upon the other with, "Who are you to address such language to me. You are only a *Dikazi*, you were not lobolaed. My husband lobolaed me. I am a wife." That there are cases of great cruelty, in which young girls are forced into marriages with old men, I admit, but is that girl any more a slave than the youthful English girl who, for a consideration, is *persuaded* to discard young Pennyless for old Moneybags?

In the Colony *ukulobola* cases are not entertained in our Courts, as they are considered illegal contracts, but in Kafirland they are tried by British Magistrates administering Kafir law, and their judgments may be appealed against in the colonial Courts; and such judgments, based on Kafir law, may be upset on a technicality. This no Kafir can understand; these cases cause irritation and distrust, and should not occur.

Cases of appeal in Kafirland should be tried by the Chief Magistrate, assisted by a jury composed of the elders of the tribe, or by a Judge appointed for that purpose, similar to the system adopted in Natal.

The following is a further contribution to this important question, being a judgment recently delivered by the Chief Magistrate of East Griqualand, Mr. W. E. Stanford, in an action

for restitution of conjugal rights, three children, and certain stock:—

The plaintiff and defendant separated many years back, and the children of the marriage followed the mother, who did not return to the guardianship of her parents, but worked for and established a home for herself, first on private land and then in a Native location. She had become a Christian, and plaintiff had other wives. The children grew up, and one daughter was married. The dowry was paid to the plaintiff. A second daughter was married and dowry paid; these cattle also plaintiff claimed. The defendant urged a right to retain a share, she having had all the care of the children.

Plaintiff would not acknowledge this right. Thereupon the girl left her husband, and refused to live with him, thus necessitating a refund of the dowry. Plaintiff now sues for restoration of the woman, the children, and all property in their possession.

It is admitted that after the separation plaintiff got back the cattle he had paid as dowry, save four head. But it is argued this was no dissolution of the marriage, as there was no reference to any Court. Such a reference is unnecessary; the consent of the woman, the delivery of her by her guardian to her husband, and the payment of dowry, are the essentials of a Native marriage as recognised in these Territories. The refusal of a woman to live with her husband and the repayment to him of the dowry cattle, or "ikazi," are its dissolution. In this case, after the dissolution the woman, as already remarked, did not return to her father. She built and maintained a kraal of her own. There are precedents within my knowledge, in which Native chiefs in such cases have recognised that such a woman is emancipated from guardianship of any kind, and is entitled to retain property which she may earn for herself. The cattle which the defendant brought with her from her relatives when she married, would fall under the same category.

The next question is as to the children of the marriage. Clearly, the father has not lost his right over them. But the woman's position is just what her parents would have been, had she gone to them when she left her husband. The father would have claimed the dowry as he has done, and the father of the

woman (grandfather of the children, or his representative), would have claimed a share for their upbringing and maintenance. In these cases it is not necessary, nor is it expected even under Native custom, to order the attachment of any child to be taken from one parent and delivered to another. It is sufficient simply to declare the respective rights of the parties, and especially in relation to the distribution of the dowry. This is not for the value of the cattle alone; the possession of them, no doubt, is of importance to Natives. But they carry recognised responsibilities with them, and uncertainty under such circumstances is undesirable. As shewn in this case, so far from the "ikazi" being a mark of servitude, it is often a Native woman's greatest protection and weapon of defence against either an unkind husband or a neglectful father. There is no power by which she can be compelled to live with any man against her wish, the ikazi notwithstanding. She is thus complete mistress of the situation, and it is only those unacquainted with the domestic life of these people who would call a Native married woman a slave.

The decision of the Resident Magistrate in respect to the property in favour of the defendant is therefore upheld. The plaintiff's claim to the children is recognised, and any dowry received for the daughters will be his, less one-third which is appointed to the defendant for her care. As there is a substantial alteration of the Resident Magistrate's judgment in favour of the appellant, costs in this Court are given accordingly.

DIGEST OF CASES.

SUPREME COURT.

Liquidators Cape of Good Hope Bank v. Knight and others. (July 7-13).—(1) Shareholders in a joint-stock concern, who sold their shares within two years of the stoppage of the institution, are not discharged from liability to creditors by a provision in the Trust Deed that upon transfer of shares the liability thereon shall pass to the transferee. (2) Former shareholders required to contribute to a deficiency in calls upon the present holders of shares in a limited

liability bank are entitled to the benefit of payments already made to creditors whereby their claims on the bank have been reduced. (3) An order for winding-up a company is a sufficient excussion of the company to entitle liquidators to proceed against contributories before realising all the assets of the company. (4) Former shareholders cannot be held to be liable for more than the present debts of the company which were in existence when such shareholders ceased to be members; and if those debts have been reduced by means of contributions obtained from other past and present members, they are entitled to the benefit of such reduction. (5) Where the estate of a present shareholder has been sequestrated, the previous shareholder can be proceeded against without waiting for the final liquidation of the insolvent estate.

Liquidators Paarl Bank v. Wicht. (July 14).—Respondent was both a shareholder and a despositor with the bank. Applicants applied for leave to take out execution for the amount of calls due on the shares held by respondent. Respondent offered to pay the difference after setting off the amount due to him by the bank. It was stated by the liquidators that the liabilities of the bank, which was an unlimited concern, would not be paid in full even though all the shareholders were excussed. Set-off not allowed.

Queen v. Sampson. (July 14).—The defendant was charged before a Special J. P. with contravening the Liquor Licensing Act. He pleaded not guilty, but after taking evidence, he was convicted and fined. He appealed on the ground that he had not been served with a summons before the trial as required by law; but the appeal was dismissed, as accused had not objected at the trial, but had taken his chance of an acquittal.

L. and S. A. Exploration Co. v. Cathypadyachy. (July 21).—Leave to appeal from a judgment of the High Court refused, the time within which an appeal could have been noted having expired, and the applicants not being remediless.

Barnett & Co. v. Namaqualand Licensing Court. (July 21).—The right of a person, who for three years has held a liquor licence, to a renewal under the 50th Section of Act No. 28, 1883, is subject to the other provisions of the Act; and consequently a Licensing Court may, under the 48th Section, of its own motion, take notice of any matter or thing which, in the opinion of the members thereof, would be an objection to the renewal of the licence, although no objection to such renewal had been made by any person. An appeal against a refusal of the Court to renew a licence, refused with costs.

Queen v. Adelling. (August 3).—At the last criminal sessions a point was reserved whether accused was properly convicted on an indictment charging him with attempting to commit the crime of theft by means of false pretences, in offering to sell certain crystals as diamonds to one H., notwithstanding the fact that the said H. did not intend to buy the stones when he pretended to bargain for the purchase thereof. Conviction affirmed, there being both an intention to commit a crime and an overt act. As to the form of indictment, see Act No. 3, 1861, § 7.

Bultfontein Mining Board v. Armstrong and the L. & S. A. Exploration Co. (August 3-4). An appeal from the High Court, refusing an interdict against a lessee from washing debris within a mining area, dismissed. The general control and management of the mining area is vested in the Mining Board, and it can secure such control being more efficient by making bye-laws, but in the absence of such bye-laws the Mining Board must show an interference with the rights and privileges of the claimholders to entitle it to an interdict. Washing *debris* is a "matter or thing in connection with mining operations" within the meaning of the Precious Stones and Minerals Mining Act.

Cillier v. Pienaar. (August 4).—Exception to a declaration for damages for slander in saying that plaintiff did not treat his wife properly, and that the wife's parents ought to go and remove her from her husband's house, in that no

cause of action was disclosed, overruled, but the Court expressed a strong opinion that an action for such words should not proceed, and would probably result in only nominal damages. [At the subsequent trial judgment was given for defendant.]

Van Zyl v. De Beer's Executrix. (August 4).—An application was made on notice for an interdict, when the Court ordered an action to be brought; the notice of motion to stand for the summons in the cause. *Held*, that the date from which the time of filing a declaration was to be reckoned, under Rule 330(*a*), is not the date of the notice, but the date when the Court ordered the notice to stand for summons.

Suburban Municipalities v. Ohlssen's Breweries Co. (August 5).—An application for an interdict restraining respondents from polluting a public stream was made after notice, and at the hearing the matter was allowed to stand over to see what could be done to abate the nuisance. The nuisance having been abated, the applicants now withdrew the motion, but applied for their costs. *Held*, that as applicants had originally sufficient grounds for coming to the Court, they were entitled to their costs.

Bam's Executors v. Haupt. (August 5).—Plaintiffs sued in the Magistrate's Court for the specific performance of a contract of sale of ten leagures of brandy at £13 per leagure; or the payment of £20 damages for breach of contract. The Magistrate sustained an exception of want of jurisdiction. Appeal against this decision dismissed.

Imroth v. Ward. (August 6).—One Wessels gave to respondent Ward the sole right to prospect on his farm and develope a diamond mine, and also to Ward and his assigns the right of purchase of the farms up to a certain date. Ward subsequently ceded part of his concession to one Laurence, who had again ceded his share to applicant. Applicant now applied for an order to compel Ward to allow him to develope the diamond mine. It was admitted that Ward was working *bonâ fide*. Application refused.

Koller v. Abbas. (August 6).—The executor of Koller sued defendant in the Magistrate's Court for rent under an agreement entered into between them. The defendant excepted to jurisdiction on the ground that the title to the property was in dispute. The Magistrate sustained the exception, after taking evidence showing that the property was registered in the name of one Andrews, now deceased, and that the *curator bonis* of the estate had demanded and received the rent, and had given defendant notice not to pay the rent to plaintiff. Appeal from this decision dismissed.

Fletcher & Co. v. Le Sueur. (August 13).—Defendant had advertised his intention to surrender his estate, but did not proceed further. Plaintiffs, who were creditors, then obtained a provisional order for sequestration, under Act No. 38, 1884, § 3. Defendant opposed, on the ground that he had found, when he had made up his schedules, that his assets exceeded his liabilities. *Held*, that no act of insolvency having been committed, the provisional order must be set aside as it did not clearly appear that the estate was insolvent, but as defendant had misled plaintiffs into proceeding, the costs of the application must be paid by him.

Curtis v. Day. (August 17).—Rule of Court No. 5, requiring all pleadings to be signed by an advocate, does not apply when the defendant himself enters appearance and defends in person.

Queen v. Rhenoster. (August 19).—Defendant was convicted of contravening the Masters' and Servants' Act, in using violence, threats and intimidation to induce a servant to leave her employment. Conviction quashed, it appearing that the defendant had used the threats, not to the servant, but to the servant's mistress.

Jassim v. The Master. (August 20).—Certain property belonging to the estate of the late Abdol Ragman was realised and the proceeds paid into the

Master. Ragman had not left issue. His mother was one of three Mahommedan wives of Abdol Garies. *Held*, that the children of the same mother were entitled to succeed each other, the mother being dead.

Viljoen v. Viljoen's Trustees. (August 20).—Husband and wife, married in community, by mutual will bequeathed their landed property to survivor for life, subject to a *fidei commissum* in favour of their children. The wife died, and the husband subsequently became insolvent, the property remaining registered in his name. The trustees of his estate now proposed to sell the husband's full right to one-half the estate, and his life-interest in the remainder. *Held*, that the trustees could not both take advantage of the benefits conferred by the will and repudiate the contract; and though justified in selling the husband's half share, they were not entitled also to sell his life-interest in the remainder.

Re McLeod. (August 20).—Petitioner was articled to an attorney at Barkly West, and filed his articles only with the Registrar of the High Court, and omitted to register his articles with the Law Society, as required by Act No. 27, 1883, § 14, within three months. The omission having been discovered, and the Law Society, after investigating the circumstances, consenting, the time served by the clerk allowed to count.

Rudolf v. Van der Merwe. (August 20).—Action had been commenced to recover £34 due as school fees for defendant's child, to which action appearance had been entered. Defendant was about to return to the Transvaal, where he resided. Notice was given to defendant of an application for an order of attachment, or for security. Order granted unless security should be given for £50. Costs to be costs in the cause.

Laurence v. Ward and Wessels. (August 20).—In this action separate defences had been set up, and judgment was given as to costs that plaintiff's costs were to be paid by defendant Ward, and defendant Wessels' costs to be paid by plaintiff. In reviewing the Taxing Officer's taxation, at the instance of defendant Ward, it was indicated that the principle which should guide the Taxing Officer was, to allow plaintiff, as against Ward, all such costs as were necessarily incurred to secure judgment as against Ward. Consequently, as it was necessary that Wessels should be a party, the costs of joining the defendants should be allowed, though plaintiff would have to pay the costs incurred by Wessels in his successful defence.

Re Paarl Bank in Liquidation. (August 24).—A compromise with a present shareholder in an unlimited concern only releases the former shareholder of the particular shares held by such present shareholder, but does not release persons who held shares other than those in respect of which there was a compromise.

Queen v. Meiring. (August 25).—After a preparatory examination had been held and the defendant committed for trial, the case was remitted to the Magistrate. Defendant being on bail, a written notice signed by the Magistrate was served on the defendant, requiring him to appear and stand his trial, with his witnesses, if any. At the trial the defendant objected that he had not received a summons, but the objection was overruled and the trial proceeded, and defendant was convicted. Defendant now brought the proceedings under review on the ground of gross irregularity. Appeal dismissed.

Imroth v. Liquidators C. G. H. Bank. (August 27)—The liquidators of the Bank obtained an attachment to found jurisdiction of one Laurence's share in a certain diamond mining concession granted by Wessels to Ward, and by Ward ceded to Laurence. Applicant Imroth now moved to set aside the attachment, on the ground that he had obtained *bonâ fide* a complete cession of Laurence's interest before the order was obtained. Order granted; there being no property in Laurence at the date of the order.

Re Grady. (August 27).—Insolvent Grady obtained from his trustee a written permission to trade, and he subsequently obtained certain goods which he insured. A fire broke out on his premises, and the amount of the policy was now payable by the insurance company. No account had yet been filed in the estate, and the trustee claimed that he was in law vested with the proceeds of the insurance; but *Held*, that the insolvent was protected, and the trustee barred by his consent to trade.

Queen v. Swartland. (August 31).—A preparatory examination was held on a charge of assault with intent to do grievous bodily harm. The accused admitted an assault, but not the assault charged. The case was remitted for trial to the Magistrate under Act No. 12, 1860, for the more serious charge, but it was held that the prisoner's statement did not justify a remittal under No. 12, 1860, and all proceedings subsequent to and including the remittal were quashed. The Court intimated that the prisoner remained liable to be tried for the offence.

Marais v. Langford. (August 31).—Application to Supreme Court to compel an appellant against a judgment of the High Court to give security for costs of appeal, refused, the proper course being to apply to the High Court to order either execution to issue or to be stayed upon security being found.

Potgieter v. Potgieter's Executor. (August 31).—The plaintiff filed a claim against the estate of the late Potgieter, which claim the executors disputed. Plaintiff instituted an action and pleadings were filed. In consequence of plaintiff's default, defendant set the case down for hearing. Plaintiff not appearing, absolution from the instance was granted with costs. The Court intimated that the executors would now be justified in closing the estate.

Watson's Executors v. Watson's Heirs. (September 3-4).—The late Watson was a shareholder in the Union Bank. The shares were not disposed of by the executors of his estate before the Bank stopped payment, but the executors had paid out the heirs. Watson's estate having been placed on the list of contributories, and calls having been made on the shares, the executors called upon the heirs to refund the amounts paid them. *Held*, that each heir was bound to refund only a *pro rata* share toward the calls.

Wright v. The Colonial Government. (Aug. 24-Sept. 8).—Judgment given against the defendants for the amount payable under a contract entered into in England for railway construction in the Colony, which amount had been equitably assigned by the contractor to the plaintiffs, a firm of English bankers.

Jooste v. Executors of Jooste. (September 8).—Although the right to the legitimate portion has been done away with, the rule still remains in force that advancements made by a parent, and debts owing by a child to him, must, in the absence of any indication of a wish on his part to the contrary, be collated, for the purpose of ascertaining the shares of the children's inheritances.

Amour v. Murray and St. Leger. (September 9).—Plaintiffs sued in the Magistrate's Court for money advanced to defendant. Defendant set up a counter-claim for a large sum for wrongful dismissal, and excepted that the matter was beyond the jurisdiction of the Magistrate's Court. After taking evidence as to the counter-claim, the Magistrate overruled the exception. Defendant thereupon reduced his counter-claim to £20 to bring it within the jurisdiction. The case proceeded, and the Magistrate gave judgment for plaintiffs in convention; and absolution on the claim in reconvention. Defendant appealed, and maintained that the exception taken in the Court below was improperly overruled; but *Held*, that as he had reduced his counter-claim and brought the matter within the Magistrate's jurisdiction, he could not now be heard to object to that jurisdiction.

Anderson and Murison v. Colonial Government. (September 11).—The applicants were the owners of a ship wrecked off Dassen Island. Some of the cargo had washed up on the island, which was the property of the respondents. Respondents refused to allow applicants to go upon the island to recover the cargo,

except under certain restrictions, as it would disturb the birds nesting thereon, and interfere with the production of guano. Applicants now asked for an interdict to prevent interference with their salving the cargo. Interdict refused, as the applicants were not entitled to go above high water mark without the consent of the owners of the land. If any of the cargo was washed above high water mark and the Government refused to give it up, an action might be brought to compel delivery.

Woodman v. Robinson. (September 12).—Plaintiff, a European cook, sued for damages for wrongful dismissal. Defendant justified on the ground that plaintiff refused to obey orders, and claimed the right to leave her master's premises whenever she thought fit. *Held*, that the dismissal was justifiable.

Langford v. Marais. (September 14).—Section 18 of the old Pound Ordinance, No 16, 1847, held virtually repealed by the General Divisional Councils Act of 1889, by which Pounds outside Municipalities are transferred from the control of the Government to that of the Divisional Councils.

Liquidators Union Bank v. Watson's Heirs, and Hofmeyr's Executrix; and Liquidators C. G. H. Bank v. Von Lier's Executrix. (September 14).—There is a legal duty upon executors to protect the interests of creditors before paying heirs; and for want of ordinary care and diligence in the performance of this duty executors are personally liable. Ignorance of the existence of liabilities may protect an executor who has taken due precautions before making a *bonâ fide* distribution of the assets, but executors held liable *de bonis propriis* for calls upon shares held by the testator and remaining in his estate, to the extent of assets distributed among the legatees and heirs. The 32nd Section of Ordinance No. 104 only protects payments made to creditors, not to beneficiaries.

Queen v. Stephan. (September 22).—The conviction of defendant, a prisoner under sentence, of conspiring or confederating with another prisoner to make his escape from custody, quashed, the evidence being that defendant had said to the other prisoner that the work was too hard, and he had better run away. Defendant afterwards said he was joking. No attempt to escape was made.

EASTERN DISTRICTS' COURT.

Regina v. Dormehl. (August 1).—Where a prisoner put in a plea of guilty to part of a charge, and, the case being remitted, the Magistrate sentenced him on his plea, the matter was sent back for the accused to be tried on the unadmitted portion of the charge.

Regina v. P. W. Erasmus. (August 1).—*Held*, that a person found guilty of wrongfully withholding wages under Act 18 of 1873, must be sentenced for such offence, an order to pay the amount being merely a civil judgment.

Friend v. Niel Swenson. (August 1).—Provisional judgment on a mortgage bond (which was opposed on an allegation by affidavit that it had been wrongfully passed) was granted on its appearing from counter-affidavits that defendant had authorised, and fully understood he was authorising, the plaintiff to pass such bond.

Guardian Assurance v. Martin Davitt. (August 1).—Affidavit of service of edictal summons in the Transvaal, before Landdrost, must be accompanied by certificate of State Secretary that the person before whom the affidavit is made is acting as Landdrost.

Smultz v. Schreiner. (August 1).—A summons under Rule 339, par. *d.*, being for £75, a liquid amount, and £25 not liquid, judgment was given for the £75, and defendant ordered to declare upon the latter claim.

Regina v. Klaas and others. (August 4).—Sentences for vagrancy under § 4 of Act 23 of 1879, must be given as amended by Act 27 of 1889, § 3.

Gerd's Estate. (August 6.)—Objection being made to taxation in costs between party and party of a charge for briefing long correspondence and evidence on commission prior to action, ordered that only such portion of brief be allowed in taxation as was necessary to enable counsel to draw the pleadings.

Isaac v. Isaac. (August 6).—It being brought to the knowledge of the Court that a person, to whom leave had been granted to sue *in formâ pauperis*, was receiving £3 10s. a week in permanent employment: *Held*, that he was not entitled to the privilege of so suing, which was accordingly cancelled.

Regina v. J. Nichaels. (August 6).—Additional evidence being placed before a Magistrate after sentence passed, which convinced him that such sentence was erroneous, the sentence was quashed by the Eastern Districts' Court, on the grounds, however, that it would not, as the record stood, have been certified upon, but otherwise the matter would have been one to send to H. E. the Governor.

Regina v. Booey and others. (August 6).—In a case in which prisoners were erroneously found guilty of theft in place of receiving, the conviction was quashed, and the case sent back for a verdict of guilty of receiving to be recorded, and prisoners to be sentenced thereon.

Regina v. Adam Moss. (August 6).—In a charge under § 10 of Act 27 of 1883, the summons should set out the words used, and also that they were used with intent to provoke a breach of the peace, or were words by which a breach of the peace might be occasioned.

Regina v. Smale. (August 6).—Where a person was charged with selling liquors to a native who had not a permit, and the proceedings were quashed on account of its not being alleged that accused was a licensed dealer: *Held*, that the matter could be tried again.

Chabaud v. Trustees Estate Schnitzler. (August 13).—Order to admit proof of debt in insolvent estate refused on summary application, the affidavits and documents produced showing it was not clear applicant was the actual creditor.

Re W. T. Cole. (August 13).—Order granted declaring patient was of unsound mind, and incapable of managing his affairs; weekly report ordered to be made to Court and *curator ad litem*.

Nbono v. Manoxoweni. (August 13.)—*Held* (MAASDORP, J., *dissentiente*), that a surviving brother (heir, according to Native customs, of his deceased brother's estate) has no right to claim that such deceased brother's wife shall return to his kraal, or, failing her doing so, that any portion of the "dowry" cattle shall be restored, the Proclamation of August, 1855, having, by declaring that 21 is the age of majority, withdrawn women from the tutillage to which they were before subject by Native custom.

Divisional Council of Stutterheim v. Giddy. (August 18.)—A Magistrate being, from his position of Chairman of the Divisional Council, incapacitated from hearing a case brought before him as the Resident Magistrate: *Held*, that he should have postponed the case, and should not have dismissed the summons.

Hassenjager v. Hassenjager. (August 20.)—Order of judicial separation granted, giving effect to the terms of a prior voluntary deed, which, by oversight, had not been made a Rule of Court, such order, however, being only between the parties, and not affecting the rights of existing creditors.

Colonial Secretary v. Town Council of Grahamstown. (August 25).—Costs of Interdict restraining Town Council from committing a nuisance, given against respondent.

Clinton v. Clinton. (August 25).—Rule *nisi* granted to show cause why a sum of money invested by order of Court, for the benefit of children of a husband who had deserted his wife for seventeen years, should not be paid to the wife, who had spent more than the sum for maintenance of the children.

Trustees in Insolvent Estate of Estment v. W. Estment and others. (August 29.)—Assets of a business ordered to be handed to trustees in insolvency, it appearing such business had belonged to, and was carried on by, insolvent.

ACTS OF LAST SESSION.

The following Bills, passed by the Legislature, have been assented to by His Excellency the Governor, in the name and on behalf of Her Majesty.

1. For applying a Further Sum not exceeding One Hundred and Ninety-One Thousand Six Hundred and Sixty-seven Pounds Sterling for the Service of the year ending the 30th June, 1891.
2. To apply a Sum not exceeding Four Hundred Thousand Pounds Sterling towards the Service of the year ending the 30th day of June, 1892.
3. To Amend the Act No. 23 of 1888, commonly called the "Convict Stations and Prisons Management Act, 1888."
4. To Provide for the Regulation of Dairies, Cowsheds, and Milkshops.
5. To make further provisions with regard to the Establishment of a Widows' Pension Fund, and to provide for the Commutation of certain Pensions.
6. To apply a Sum not exceeding Four Hundred Thousand Pounds towards the Service of the Year ending 30th day of June, 1892.
7. To enable the Grahamstown Municipal Council to obtain Advances from Banks by Overdraft of its Current Account, or from any Person, Institution or Company.
8. To repeal the Ordinance No. 6, of 1833, and to make other provision in lieu thereof.

9. To authorise the Repeal of Certain Ordinances hereinafter mentioned.
10. To Incorporate the Diocesan College Council, Rondebosch, and for other purposes.
11. To Amend the Act No. 14 of 1870, commonly called "The Cattle Removal Act, 1870."
12. To Amend the Law relating to Life Assurance Companies, with a view to encouraging persons to Insure, and to protecting persons Assured.
13. To Extend the Provisions of the Eighteenth, Nineteenth, Twentieth and Twenty-First Sections of "The Crown Lands Disposal Act, 1887," to Lessees of Land under and by virtue of the Ordinance No. 3 of 1874, of Griqualand West.
14. To Amend the Law with regard to the Erection and Maintenance of Dividing Fences.
15. To Prohibit the Native Dances known as the "Abakweta" and "Intonjane" Dances.
16. To Provide for Constructing, Equipping and Working certain Lines of Railway, including a Bridge over the Orange River.
17. To Consolidate and Amend the Law relating to Oaths, Affidavits, Affirmations, and Solemn Declarations.
18. To Regulate the Deeds Office, and to amend the Law relating to the Registration of Deeds.
19. To Amend the Act No. 27 of 1889, commonly known as the "Vagrancy Law Amendment Act."
20. To Incorporate the Capetown Chamber of Commerce.
21. To Consolidate and Amend the Law relating to Juries.
22. To Amend the Law relating to Trial by Jury in Civil Cases.
23. For Constituting an additional Fiscal Division.
24. To Amend the Law regulating the Sale of Intoxicating Liquors.
25. To Amend the Law with regard to the Leasing of Crown Lands, and the disposal of Land, other than Crown Lands, the property of the Colonial Government.
26. To Amend the "Trade Marks Registration Act, 1877."
27. To Amend "The Vineyards Protection Act Amendment Act, 1886," and to continue for another year the Fourth Section of the Act.

28. To Authorise (in so far as Colonial Territory is concerned) certain persons, or a Company formed by them or acquiring their Rights, to Construct, Maintain, and Work a Line of Railway from the Mouth of the St. John's River to the District of Maclear, in East Griqualand.
29. To Apply a Sum of Money for the Service of the Year ending the 30th day of June, 1892.
30. To apply a Sum not exceeding Twenty-seven Thousand Two Hundred and Twenty-seven Pounds Five Shillings and Sixpence Sterling for the purpose of meeting and covering certain Unauthorised Expenditure.
31. To provide for the Construction of certain Public Works.
32. To Provide for the better Repression of Theft of Stock and Produce.
33. To Repeal Ordinance No. 32 of 1830, and to make provision for the Licensing and Registration of Medical Practitioners, Apothecaries, Dentists, Chemists and Druggists, Midwives and Nurses.
34. To Amend the Law relating to Lunatics.
35. To Abolish the Exemption from Certain Rates in respect of Certain Immovable Property vested in Her Majesty the Queen in Her Colonial Government, or occupied by the said Government for public purposes.
36. To Amend "The Scab Act, 1886."
37. To Amend the Act No. 36 of 1886, commonly called "The Game Law Amendment Act, 1886."
38. To Consolidate and Amend the Law relating to Banking and to Secure and Regulate the Circulation of Bank Notes.

This Act was reserved by His Excellency the Governor for the signification of Her Majesty's pleasure, and in due cousre the Act was assented to and has become law.

CAPITAL PUNISHMENT UNDER THE COMMON LAW.

A great deal of interest has been recently taken by the public in the case of *McKeone and Cooper*, who were tried and convicted at the last Criminal Sessions of the High Court at Pretoria before the Chief Justice of the Transvaal. The public were, after the trial, startled by the news that these two men, after being found guilty of the crimes of highway robbery and attempt to murder, had been sentenced to the last punishment of the law, viz., death.

The only interest which this sentence has for the legal world arises from the fact that a punishment, which, by apparently common consent and custom of years had become obsolete, has been suddenly revived.

There is no question but that by the common law, which in these sort of cases obtains both in this Colony and in the South African Republic, it is competent for Judges to pass the sentence of death not only upon those found guilty of highway robbery and attempt to murder, but also upon those found guilty of rape, larceny, &c.

In this Colony, rather more than 20 years ago, the sentence of death was passed upon a man convicted of rape in Grahamstown. That is the last instance of capital punishment being inflicted upon anyone for any crime other than the crime of murder, we believe, in the Cape Colony. Now lawyers who have watched the growth and development of common law, as denoted and expressed by judicial acts, might possibly argue that in this Colony at least the common law has in the last twenty years grown and developed in respect to the punishment of crime to such an extent that it is no longer competent for Judges to pass the sentence of death upon any criminals other than those found guilty of murder. In the early part of this century nearly all crimes which could be defined as felonies were punishable in England by death. This punishment of death was gradually restricted by a series of Acts of Parliament beginning in 1827, and continuing until 1861, when the infliction of the capital entence was confined to cases of murder, treason, and burning of dockyards. The common law in this country seems to have

followed in its growth the legislative development of the English criminal law, and one would have thought that the criminal law of the Transvaal would have advanced in a similar way, but, as above stated, the world has been astonished to find that this was not the case.

There are some people who contend that the common law, as expressed in old text-books, remains the common law until it is enacted otherwise by the Legislature, or set aside by a competent Court. This can hardly be said to be the case; if it were, according to English law a man might be sentenced to a long term of imprisonment for adversely criticising a dogma of the Church; or, according to Roman-Dutch law, as laid down by Van der Linden, which, if the theory above stated is the case, continues to be the common law of this country, some criminals may be punished by being broken on the wheel with or without decapitation, strangling with or without scorching, &c.

A COURT OF APPEAL FOR SOUTH AFRICA.

Space at our disposal for the current number admits of nothing like an adequate notice of this subject, which has been placed prominently forward by a letter which was recently published in the *Pall Mall Gazette*, of London, from the pen of the Attorney-General of the Cape, the Hon. J. Rose Innes, Q.C., supporting the proposal for a South African Court of Appeal, and abolishing the privilege now common to all British Colonies of a right of appeal, in certain cases, to the Privy Council. The motive of those who urge the abolition of appeal to the Privy Council and the substitution of a Court of Appeal consisting of Judges from all the States in South Africa, is not concealed. The argument is honestly and fairly advanced that by retaining the Court of ultimate appeal in every case within South Africa, the confederation of the South African States in general would be greatly facilitated. It is, then, as a means to an admittedly great end that this demand is advanced. No suggestion is made that the Judicial Committee of the Privy Council have ever blundered in their decision as to what advice should be tendered

to the Crown in any particular instance. It is urged that Judges of States in South Africa are, from their acquaintance in every day practice with Roman-Dutch law, necessarily better qualified to decide in a Court of ultimate Appeal than Judges whose associations in practice have not been in South Africa. From this point of view, it is difficult to question the soundness of the argument in favour of the proposed South African Court, and also in favour of the abolition of the appeal to the Privy Council. This subject has already been discussed in the pages of the *Cape Law Journal*, and, without doubt, very many of the legal profession throughout South Africa regard the creation of a South African Court of Appeal as a "consummation devoutly to be wished."

But something more, and very much more, is necessary to the end which the legal profession of South Africa may desire to attain than may, perhaps, at first sight meet the eye of those who, doubtless with very good ground for their contention, urge this very great step in the direction of union amongst the several States of South Africa. There are considerations outside those which are all-powerful with the professional reasoner. There is great pride of independence as regards the Cape Colony on the part of the Orange Free State, of the South African Republic, and even on the part of the Crown Colony of Natal. So long as the leaders in politics of any one of these States choose to stand aloof from the proposal, so long is the proposal, in the fullest extent, impracticable. The Cape Colony can, assuredly, force no such proposal upon any one of the States named. The desire for union in law requires to grow gradually just as it may be expected that, with time, a desire for union in a far wider sense may be hoped for and expected to grow. But the desire must be common to each State, and no one State can hope to further the object in view by even seeming to force the hand of sister States. There are wide differences in sentiment, a very powerful factor in politics, among all the States. Even recently in one case the recognition of the common law which in theory is the common law of every State in South Africa, startled the whole of South Africa, and, upon the whole, it may be said that the consensus of opinion was unfavourable to the revival of the penalties prescribed by the common law upon a conviction for highway robbery and attempt to murder. But the Judge who

passed sentence of death in the case referred to acted, admittedly, within the limits of the law, and the Executive of the Transvaal deliberately confirmed the sentence, which, nevertheless, it was ultimately thought fit to commute.

The Court of Appeal which the Cape Colony, until recently, possessed was an all-powerful aid towards the development of a general Court of Appeal. The abolition of this Court was, emphatically, a retrograde step. The Court possessed, in an eminent degree, the confidence of the Cape Colony, and its decisions were quoted and received with respect throughout the Courts of the Free State, the Transvaal, as well as of Natal. Constituted as the Court was, its decisions were received and quoted with far greater respect, and were credited with far greater weight, than can possibly be attached to the decisions of the present Supreme Court of three Judges. Probably, hardly any one of our Judges in the Cape Colony favoured the retrograde step of the abolition of the late Appellate Court. Beyond all question, the re-establishment of the former Appeal Court of the Cape Colony is a *sine qua non* to the development of such a Court of Appeal as the Attorney-General very properly desires to see established. There must be a Court of Appeal in the Cape Colony from *all* the Courts of that Colony. There is at present no appeal from the decision of three Judges who happen to form the Supreme Court of the Cape Colony. With the establishment of the right kind of Appeal Court, and the late Court was highly satisfactory, appeals from the Colony, from British Bechuanaland, as well as from Basuto-land, might reasonably be expected to come. The tribunals in *Zambezia* may reasonably be expected to decide questions of first-rate importance urgently requiring, on appeal, the best Court of Appeal that can be devised. At present it may safely be asserted no such Court exists, notwithstanding that for the purposes of the "Africa Order in Council, 1889," the Supreme Court has been created a Court of Appeal by Act 3, of 1890. We have already hinted that this great need can only be met by a common demand, and one of steady growth. True states-manship seems to demand that this fact should be realised, and the sooner the better. There is, and rightly so, such an ingredient in the composition of States as jealousy. A South African Court of

Appeal will never be created so long as any one of the States we have referred to continues jealous of its absolute independence, and a proposal of the kind under consideration coming from a Minister of the Cape Colony is really calculated to excite jealousy in at least one of the States which have to be considered in this matter. There are further questions which might be raised in consideration of this very important proposal, not least among which is the question as to the authority by which the proposed South African Court would be created. There must, in the first instance, be a relinquishing on the part of the Imperial Government of an important right, a right, too, which some wealthy persons and institutions in the Cape Colony may be very far from desiring to see relinquished.

There cannot be any question but that, as the Attorney-General plainly states, the creation of a South African Court of Appeal will be a very great stride towards the confederation of South African States in the ordinary acceptation of the term. Is each one of these several States eager to federalise? Until that question can be answered by each particular State unhesitatingly in the affirmative, it will be well to allow the object so many have in view to grow, until by common consent, and the sense of a common necessity, the desired end shall seem more likely of being attained than seems to be the case at present.

JUDICIAL CHANGES.

At the time of publication many rumours are current as to contemplated judicial changes. The vacancy at the High Court, Kimberley, has not been filled up. It is said this is to remain open until the return from England of the Attorney-General. Another rumour points to the early retirement of the Hon. Mr. Justice Smith, while yet another suggests the appointment of a special Judge, or Recorder, in the native territories of Transkei and Tembuland. The Attorney-General is also credited, in some quarters, with an inclination to disturb the present system of three three-Judge Courts in favour of a number of single-Judge Courts, retaining the Supreme Court as the Court of Appeal. There can be little doubt but that the conversion of the Supreme Court,

consisting of three judges, into a Court of Appeal very effectually removes business from the Court of the Eastern Districts as well as from the High Court of Kimberley. Whether this was intended or not when the former Court of Appeal was abolished, there can be little doubt but that the judicial system of the Cape Colony might be placed in a more satisfactory state than at present is the case.

REVIEW.

THE STATUTE LAW RELATING TO MINING OF THE CAPE OF GOOD HOPE*.

This is a very useful work, inasmuch as it brings within the limits of a very moderate-sized volume, all the statute law of the Cape upon a very important subject. The book is not, apparently, the work of a lawyer, a fact which possibly excuses any reference to cases relating to mines and minerals and rights of parties connected with them, which have been decided in the Courts. Mr. Hammond Tooke has evidently proceeded *con amore* in what must have been a rather laborious undertaking. There is an elaborate "Historical Introduction," which narrates the history of mining and mining law from 1867, when the first diamond, we are told, was found near Hopetown. Then there is a digest of the Statute Law, worked up evidently with great labour. Then comes, in Part 2, the Statute Law. Part 3 sets forth "Minor Legislation." This surely cannot be intended for a pun, yet it is difficult to accept the phrase "minor" legislation in a work submitted by the author to the legal profession. "A. G.'s Op." is evidently a reference to an opinion of the Attorney-General. There is an appendix. To miners, and all who may contemplate becoming miners, the work is a valuable one; to the legal profession, the collection of the Statute Law, &c., is useful. The work is, however, evidently a labour of love, and Mr. Tooke no doubt secures his chief reward in that reflection.

*The Statute Law of the Cape of Good Hope relating to the Mining of Precious Stones and Metals, and other Minerals, with Digest and Index compiled, and arranged by W. Hammond Tooke, of the Crown Lands Office. Capetown: Darter Bros. and Walton. 1891.

NOTES.

Curious Circuit Customs.—The *Journal of Jurisprudence* prints the following from *Green Bag* :—Old customs, rapidly dying out under modern innovation, appear to retain greater vitality among ancient institutions. As "going circuit" by the Judges of England is one of the most ancient occurrences in our history, one is prepared to find some of the oldest ceremonies and observances connected with that time-honoured usage still existing. From an article in the *Leisure Hour*, we extract some interesting facts concerning "Circuit Customs."

Let us first take the matter of gloves. Everyone knows that when an assize town has no prisoner for trial to bring before the Queen's Justices, or where, in more ancient time, no prisoner had to be sentenced to death, the town is, or was, said to have a "maiden assize;" and the High Sheriff presented, and still presents, the Judge presiding in the Criminal Court with a pair of white kid gloves.

But the *meaning* of the custom is not so clearly understood, and has occasioned much discussion. To wear gloves, or have the hands covered, is a mark of superiority, whereas to go without gloves is a mark of submission; and as a Judge owes submission to the Sovereign whom he represents, and under whose commission he sits, it would be an assumption of too great dignity were he to have his hands covered when acting as deputy of the Sovereign in the execution of the Royal Commission; hence, says Seldon, "Judges wear not gloves while they act in their commission." But where there are no prisoners to try, or in ancient times where no prisoner was to be condemned to death, and therefore (death being the common punishment of all criminal offences, from stealing to the value of one shilling upwards) the higher powers of the Crown were not to be called in exercise, and ordinary magistrates' functions were to be executed by "delivering the gaol," the Sheriff signified to the Judge, by presenting him with gloves, that he might retain that portion of his attire of which he had divested himself while acting as his Sovereign's representative. The gloves so presented are usually *white*, as indicative of the purity of the county from crime.

Newcastle-on-Tyne is the only remaining circuit town in England which presents gloves at the assizes, and which still observes some of the olden ceremonies in connection with judges of assize. With the single exception of the city of Bristol, no other towns insists upon entertaining the representatives of the Crown during the assizes. When the assize work is over, the mayor and aldermen, in full regalia, attend the Judges, and the mayor, as spokesman, makes a speech somewhat as follows:—

"My Lords, we have to congratulate you upon having completed your labours in this ancient town, and have also to inform you that you travel hence to Carlisle through a border country much and often infested by the Scots; we therefore present each of your lordships with a piece of money to buy therewith a dagger to defend your lordships."

He then presents to the senior Judge a piece of gold coin of the reign of James I., called a Jacobus, and to the junior Judge a similar coin of the reign of Charles I., a Carolus, and, after having been duly thanked by the Judge in commission, retires. The Corporation have had at times great difficulty in procuring these coins for the purpose of the assize; but as keeping up the ceremony is enjoined by one of their ancient charters, they are loth to let it drop.

We cannot but share the doubts expressed by a witty ex-Judge, who, upon receiving the gold after the mayor's exordium said: "I thank the Mayor and Corporation much for this gift. I doubt, however, whether the Scots have been so troublesome on the borders lately; I doubt, too, whether daggers in any number are to be purchased in this ancient town for the protection of my suite and myself; and I doubt if these coins are altogether a legal tender at the present time."

The steward of Warwick Castle still brings to the "Judge's lodgings," spring, summer, and winter,—if a winter assize be there held,—the keys of Warwick Castle grounds, that the Judges may "recreate themselves therein" during their stay in the town.

Presents of food and drink, especially of the former, are now rarely made to the justices of assize, though anciently they were very frequent. Flowers and fruit are still tendered by, and accepted from, country gentlemen of position; and venison, when in season, from the great country parks and seats, the owners of

several of which have affixed to the conditions of the tenure of their estates, that of providing the King's justices with "fat bucks and does at the assizes."

At Cambridge, where the Judges are lodged in Trinity College, the "heads of houses" present twelve bottles of very choice port wine, and brew three barrels of very potent ale for the Judges and their attendants; while at Lancaster, under the provisions of the will of a benevolent old lady, who died some centuries since, and who doubtless gained some heavy verdict in her favour, two dozen bottles of very rare and fine old port are brought to the "lodgings" at the commencement of each assize.

The only other present we need allude to is the bouquet of flowers placed on the bench before the Judge during the exercise of the duties of his office. These are mostly the result of ancient bequests; but where there is no special means from which they may be supplied, the High Sheriff provides them, sometimes at great personal cost.

Flowers in Court were originally used for preventing by their odour the effects of "gaol fever" upon the Judge and his associates on the bench; and for a similar purpose, and until quite recently, small bunches of rue were placed before the prisoners upon trial at the Old Bailey.

Such are some of the old circuit customs which still exist, but a greater number are among the "things which were." Not more than forty years ago in every garrisoned town the soldiers could not leave their quarters without leave of the Judge first had been obtained, and to procure which the officer first in command, in "full fig" with adjutant attending, waited at the Judge's lodging on the commission day for the requisite permission to loose his men from barracks. He presented to the Judge for approval or alteration the table of rations accorded to the troops, and handed in the surgeon's report as to the health of the soldiers.

The governor of Lancaster Castle and the mayor of Lancaster, until recently, severally gave up their keys and staff of office to the assize Judge when he visited that town; while both at Appleby and at Chester the Judges resided during the assizes in the castles themselves, and every night, after "locking up," the keys were brought to them as governors of the fortresses. Durham is now

the only town in England which receives the Judges into a castle, and a grand one, too, with the accessions of ancient carved oak, tapestry, and most ghost-like state rooms.

The mayor of Banbury, accompanied by several members of the Corporation, until lately presented themselves at the Judges' lodgings ot Oxford, and offered the Judges Banbury cakes, wine, six long clay pipes, and a pound of tobacco, accompanying the gift with many complimentary expressions.

Until 1859 the ancient Corporation of Ludlow were accustomed to come to the door of the Judges' carriage, as they travelled by rail from Shrewsbury to Hereford, and to offer the cake and wine, the former upon an ancient silver salver, the latter in a "loving cup" wreathed with flowers.

Fees of the Parliamentary Bar.—We published on Thursday a formidable list of the counsel engaged on the Watkin Bill. It comprised eight Queen's Counsel, and thirteen "juniors." But all but one Q.C. (except those appearing for the promoters) and several of the juniors are "stage-army-men," and do duty several times over for several clients. Thus one Q.C. appears for eight, another for four, two for three, one for two parties, who may or may not have different or even conflicting interests, and as to some of whom, such as the Clergy Orphan Corporation and the vestry of St. John's, Hampstead, one wonders why they appear at all, except it be that their legal advisers love the law—not wholly for its own sake. One also wonders why others are even allowed to appear, why the Great Northern, the Midland, and the North-Western should spend their shareholders' money and waste the public time and expense merely to bolster up their own monopolies. But so it is, twenty different sets of people are allowed to rush in and lavish their money on Parliamentary counsel, Parliamentary agents, and Parliamentary engineers, to show that people who wish to spend their money in giving the public greater railway facilities should not be allowed to give them.. It is interesting to estimate the cost of this little band of Parliamentary counsel only. Without seeing the briefs, it is of course impossible to know exactly, but we can form a shrewd estimate of what is probably a minimum cost. In the first place, these forty-three different

counsel (though only twenty-one different men) cost 215 guineas to retain. The promoters' three counsel cost, presumably, at least 450 guineas on their briefs; the most reduplicated Q.C.'s can hardly cost less than 375 guineas apiece on their briefs, the others, more eminent though less reduplicated, not less than 600 guineas between four of them; and the thirteen juniors, some appearing without a leader, some with, will, on a very modest estimate, be briefed to the tune of 700 guineas between them. Each of these twenty-one-forty-three gentlemen will also receive 15 guineas a day, by way of daily reminder of their duties, while the case lasts. Say it lasts only ten days, and as the day is from twelve to four, with intervals for refreshment and "divisions," that is a moderate expectation—and we have another little sum of 6,450 guineas to be distributed. So altogether the little bill of the Parliamentary counsel totals up as follows:—

Retainers	215 guineas
Briefs (Q.C.'s)	1700 ,,
,, (Juniors)	700 ,,
Committee and Consultation Fees for ten days ..	6450 ,,
	9065 guineas, or over £9500.

And this is besides the payment of the twenty-one-forty-three clerks, as it is one of the privileges of Parliamentary counsel, in common with their less highly remunerared brethren of the Bar, that the client pays their clerks. If, therefore, this little Bill does not cost £10,000, divided among twenty-one gentlemen, who at the same time are most of them probably briefed several times over, to be in several different places at once on the same day, we shall be much surprised.—*Pall Mall Gazette.*

When will such good times come to the South African Bar?

Election of a Layman as a Judge.—At a recent election of a Judge in a district in the State of Kansas, the Farmers' Alliance candidate was elected to fill the office. There is no reason surely, under our neighbours' system, good or bad as it may be, of electing their Judges, why the candidate of any one section of the community might not be as capable a man as the candidate of any other section; but in this particular case it so happens that the gentleman in question, although of admitted high character, is not a lawyer. Such an event could not happen in any country but that of the neighbouring Republic, where equally surprising things

are of daily occurrence, as witness the recent case of a pardon given an offender on condition that he abstain from the use of intoxicating liquors. It does not appear that this man was elected by way of a joke, as was the case in a neighbouring State, where a woman was elected mayor, in order to show that such an event was possible, although there is nothing, we believe, in the Constitution of the United States which imposes a business or technical qualification on any official, except the State Engineer and Surveyor, who must be a "practical engineer." The election above referred to is, we think, the first instance in which a layman has been chosen, and it is probable that the country will await the result of his decisions before electing other men, who in a higher Court would probably be so absolutely incapable as to necessitate their removal; and the question as to whether incapacity from want of education is sufficient to remove such an official, is a very wide field for discussion. Possibly our neighbours in such a case would avoid the difficulty by retiring him with a pension. We append an apparently genuine letter to the *American Law Review*, we presume from one of the "Allianse":—

HOUSE OF REPRESENTATIVES,
TOPEKA, KANSAS, January 15th, 1891.

Eds. American Law Revyou:

In your last knumber you praesume to speak disparraging of Bro. McKay, the farmer's allianse judge. You say with A snear, he can jedge good enough for Us. You forgit that menny of the moast emmenent Judges and Staitsmen commenst as farmers. Youer bioggrafy of Judge Miller shoes that a Man mey bea a grate Judge an yit no verry littel about lor when first commensin. if you was in Bro. McKays coart no dout you woud git the verry kind off jestis you doant want. he kin jedge good enogh for all sech as you. How is it in youer Big sitties Doant you putt upp the judishel nominashuns at publik orkshun and bortter them auf to the Highest bider? Hevent you sed this time en agin? My Loryer sez you hev. Doant you kno thet ef a Yeller Dog was nommenated For supream jedge on the demmokat tickett in Missoory an Cheaf gustise Marshel ware nomenaited on the republekin tiket the Y. D. wud bea Elektid by a strait Party voat? and ef the republikins in Saint Louis ware to nomenate a reggilar

jackass woudent the Sante Lous duch all cum upp to the skratch and Elect Him. hesent the republekens allus hed a Niggur on thare tikket at every St. Lous elekshen ? Bro Mekkay ken tak kare of R R companyes and the Trusts, en you had beter taik cair oph youer Subskripshen List in Kanses. Goa on and Drink yore Sante Lews Bear pison and all, but let onset peaple aloan. wea kansas pharmers doant wont enny moar Border Ruphenism in ourn and wea wunt have itt.

Yours So, So, A KANSAS FARMER.

P.S. Excuse mistaiks I hev to be a leetle equinomikel untel were get the procriation bill past then I intend to heve a Privet Sectary.—*Canadian Law Journal.*

The following, from the *Western Law Times*, may be of interest in connection with the case of *Gerd's Marriage Settlement*, *C.L.J.*, present Vol., p. 66:—In Ontario, as in Manitoba, much trouble has been caused by the efforts of the Legislature in the case of fraudulent conveyances to escape from the refinements of the Courts upon the question of intent, and to establish a more definite criterion of the validity of such transactions. In doing this the words "or which has such effect"* have caused general discussion. The Court of Queen's Bench in Manitoba has apparently held that "intent" was not material by virtue of the words above cited. Chief Justice TAYLOR, in *Stephens* v. *McArthur*, 6 Man., R. 496, at p. 503, said, in referring to the section avoiding fraudulent preferences, that "it was argued that it is still necessary to prove an intent to prefer, participated in by both the debtor and the preferred creditor, and the words 'which has such effect' refer only to this preferring, and not to the defeating, delaying or prejudicing;" and after consideration of the various authorities, he says, "I cannot, on full consideration of them, come to any other conclusion than that a conveyance which has the effect of delaying, defeating creditors (*sic*)—*quære* 'or prejudicing'—or of preferring one creditor to another, is void

*The statute in part reads as follows:

Every gift . . . conveyance or transfer . . . of any goods, chattels or effects . . . made by any person . . . when in insolvent circumstances . . . with intent to defeat, delay, or prejudice his creditors, or to give any one or more of them a preference over his other creditors, or over any one or more of them, or which has such effect, shall, as against them be utterly void. Man. R. 49 Vic. 45, sec. 2,

equally with one executed with the intent to do so." In other words, the dictum of OSLER, J., in *Kennedy* v. *Freeman*, 15 Ont., App. R. 216, cited in the judgment of the learned CHIEF JUSTICE, was apparently approved. The dictum as cited is, "Upon the whole, it appears to me that the plain language of the act calls for the construction I have indicated; for conveyances by an insolvent which have the effect of defeating his creditors seem to be in express terms avoided equally with those which are made with that intent." This would mean that the words "or which has such effect" refer not only to the clause immediately preceding, which relates to the giving to "any one or more of them a preference over his other creditors, or over any one or more of them, but to the antecedent clause relating to intent to defeat, etc. This had the result of holding intent not to be material. The later Ontario cases upon the statute seem to tend in the direction of holding "intent" still to be material. ARMOUR, J., in one case said that, although he was inclined to give a different verdict, "yet in view of the recent amendment to the statute by the Court of Appeal" he must find for the defendant. But in the brief note of *Molson's Bank* v. *Halter*, 1 W. L. T. 229, the Supreme Court has held that the words "or which has such effect" in the section referred to only apply to the clause immediately preceding, that is, to the case of giving one or more of the creditors of the transferor a preference over others, and do not apply to the case of defeating, delaying or prejudicing creditors. This being so, by implication, then "intent" must still be held to be material. We are informed that numerous chattel mortgages have been held in this Province to be void under the authority of *Stephens* v. *McArthur*. That case has been taken to the Supreme Court, has been argued, and now stands for judgment. It therefore appears to us that "intent" is still material, and although the case may be sustained in the Court above on other grounds, it is over-ruled on this particular point.

In Vol. I of the *Cape Law Journal*, the following appeared as a "Conundrum for Articled Clerks." It was a case then *sub judice* in the American Courts: A deceased gentleman of Kentucky left a will which puzzled the wiseacres of the whole United

States. At the time of his death his wife was *enceinte*, and he willed to her, if she should be delivered of a daughter, one-half of his estate, and the remainder to the daughter. If she gave birth to a son he was to take two-thirds. Neither of these alternative bequests met the actual event, for the lady gave birth to twins—a boy and a girl. What was to be done under the will? We are not in a position at this moment to hunt up the decision of the case in the American Courts, but must hope to ascertain it for a future issue. The "Conundrum," however, appears to have recently attracted the notice of a younger son, who is still at school, of Dr. Key, M.A., M.B., of Worcester. Dr. Key sends us the solution arrived at:—

$\frac{6}{12}$ In case of Daughter
$\frac{8}{12}$ In case of Son
} Mother.

2)10

5 Average expectation.

Mother	$\frac{6}{12}$	Expectation in all cases	..	5
Son	$\frac{8}{12}$	,, ,,	..	8
Daughter	$\frac{6}{12}$	,, ,,	..	6
				19

Divide the estate into

$\frac{5}{19}$ $\frac{8}{19}$ $\frac{6}{19}$ .. $\frac{19}{19}$

May we not hope that this indicates the promise of a future successful lawyer for South Africa?

A correspondent writes as follows:—Will you kindly, in your next issue of the *Law Journal*, have the following matter explained, viz:—

A and B were summoned for £20 damages, the one paying the other to be absolved. A copy of summons was served on both, but on the wrong B, there being two parties of the same name; consequently the wrong B appeared. The agent for defence objected to the case being proceeded with on the ground that A and B were summoned jointly; the right B not appearing, A cannot plead and consider the summons void. In support of this the agent for defence quoted the *Law Journal*, 1886, Vol. III, p. 6. The Magistrate overruled this, and erased B's name from the summons, and had the case proceeded with as against A.

I trust you will excuse me intruding upon your valuable time, but I consider this point worth the *Law Journal's* attention, specially to bear out Vol. III, of 1886.

In compliance with the foregoing request we may point out that it depends entirely upon the nature of the case, whether A and B are jointly or separately liable. The case put merely says "summoned for £20 damages," without saying for what, or how sustained. If the facts should show that they are jointly liable, then the objection taken for the defence is a good one, as both defendants must then be properly before the Court. On the other hand, if they are separately liable, or one only is liable, then the Magistrate was right in erasing the name of the defendant not served, and proceeding with the case against the other defendant.

The principle contained in the reference to the *Law Journal* is quite right.—[ED. *C.L.J.*]

CONTENTS OF EXCHANGES.

The Law Quarterly Review. Vol. VII, No. 28, for October, 1891. London: Stevens and Sons, Limited.

Notes—Natural Law and the Behring Sea Question, by T. B. Browning—Some Notes on Terminology in Contract, by Sir W. R. Anson, Bart.—The County Court System, by Charles Cautherley—Frankalmoign in the Twelfth and Thirteenth Centuries, by F. W. Maitland—The American and British Systems of Patent Law, by James H. Bakewell—Maintenance Clauses, by J. Savill Vaizey—Wrongful Intimidation, by S. H. Leonard—Reviews and Notices—Contents of Exchanges.

The Journal of Jurisprudence and Scottish Law Magazine. Vol. XXXV, Nos. 416, 417, and 418 for August, September and October, 1891 Edinburgh: T. & T. Clark.

No. 416. Editorial—Execution of the Judgment of Death—Some Notes on Scottish Criminal Procedure—Appointment—Obituary—The Month—Reviews—English Decisions.

No. 417. Editorial—Parochial Settlement as effected by orders of the Boundary Commissioners—Obituary—The Month—Reviews—English Decisions—Sheriff Court Reports.

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No. 8. Scintillæ Juris—The Maiming of the High Court—The City Murder Case—Strikes - Instalments—Futile Associations—Employers' Liability — Excerpts — Education—Reviews—Correspondence—Newspapers in Native States—Privy Council Cases—House of Lords—Notes of English Cases—Syllabuses of latest American Decisions.

The Canada Law Journal Vol XXVII, Nos. 12, 13 and 14, for July, August and September, 1891. Toronto: The J. E. Bryant Co., Limited.

No. 12. Editorial—Notes on Exchanges and Legal Scrap Book—Diary for July—Early Notes of Canadian Cases—Notes of United States Cases—Exchequer Court Rules—Autumn Assizes, 1891—Chancery Autumn Sitting—Osgoode Hall Library—Law Students' Department—Law Society of Upper Canada—The Law School.

No. 13. Editorial—Notes on Exchanges and Legal Scrap Book—Correspondence—Diary for August—Early Notes of Canadian Cases—Appointments to office—Flotsam and Jetsam—Law Society of Upper Canada.

No. 14. Editorial—Notes on Exchanges and Legal Scrap Book—Proceedings of Law Societies—Diary for September—Early Notes of Canadian Cases—Flotsam and Jetsam—Law Society of Upper Canada.

The Canadian Law Times. Vol. XI, Nos. 10 and 11, for August and September, 1891. Toronto: Carswell & Co.

No. 10. Ontario Legislation—Editorial Review—Book Reviews—Review of Exchanges.

No. 11. Crossed Cheques—Curiosities of the Criminal Law—Editorial Review—Occasional Notes.

The Western Law Times. Vol. II, No. 6, for September, 1891.

The Disbarring of Barristers—De Præsenti—Flotsam and Jetsam—Briefs—Reports.

Acknowledged with thanks, numbers of The Medico-Legal Journal (published under the Auspices of the Medico-Legal Society of New York) for June, September, and December, 1890, and March, 1891. Also,

Natal Law Reports. New Series, Vol. XII, Part 4, for July 1891. By W. Broome, Advocate. Natal: Munro Brothers (for the Natal Law Society).

ANSWER TO CORRESPONDENT.—*Meli*:—The Cases you put are such as ordinarily arise in practice, and they are not such abstract questions as we can feel justified in answering.—ED. *C. L. J.*

END OF VOL. VIII.